Supreme Court, U.S.
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961156 JAN 22 1997
No.

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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1996

THE PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation, CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey corporation, and REV. DAVID B. CUMMINGS,

*Petitioners,*

v.

CHRISTINE TODD WHITMAN, GOVERNOR OF NEW JERSEY, in her official capacity, *ET AL.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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199 pp

## QUESTIONS PRESENTED FOR REVIEW

(1) Did the court of appeals err in failing to hold portions of the New Jersey Law Against Discrimination ("LAD") facially unconstitutional on grounds that Petitioners' free speech and equal protection of the law were violated by impermissible (a) overbreadth, (b) content and viewpoint discrimination, and (c) compelled speech?

(2) Did the court of appeals err in granting *Pullman* abstention on certain issues when the stipulated record showed substantial free speech and equal protection violations and there were no unsettled issues of state law justifying abstention?

## PARTIES TO THE PROCEEDING BELOW

Petitioners: The Presbytery of New Jersey of the Orthodox Presbyterian Church, a New Jersey corporation, Calvary Orthodox Presbyterian Church of Wildwood, a New Jersey corporation, and Rev. David B. Cummings.

Respondents: Christine Todd Whitman, Governor of New Jersey, in her official capacity (as successor in office to Governor James Florio); Peter Verniero, Attorney General of New Jersey, in his official capacity (as successor in office to Attorney General Robert J. Del Tufo), Marilyn Flanzbaum, Angel Roman, Betty Carson, Olga L. Vazquez-Clough, Felton Lingo, Sr., Reinhold W. Smyczek and Casey Tam, all in their official capacities as members of The Division on Civil Rights, and C. Gregory Stewart, in his official capacity as executive director of The Division on Civil Rights; and John Doe(s) and Jane Doe(s) addresses unknown, the last two being fictitious names, the real names of said defendants being presently unknown or known only in part to plaintiffs, said fictitious names being intended to designate organizations, persons and others acting in concert with any of the defendants, who engage in, are engaged in, or who intend to engage in, the conduct of defendants complained of herein, or who would have the right to file or seek enforcement of administrative, equitable or legal complaints or suits or to assert any other legal claims or remedies or enforcement thereof against the plaintiffs under the New Jersey Law Against Discrimination, as amended by the 1992 affectional and sexual orientation amendments, and all others similarly situated.

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v.

CHRISTINE TODD WHITMAN, GOVERNOR OF NEW JERSEY, in her official capacity, *ET AL.*,

*Respondents.*

## Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, The Presbytery of New Jersey of the Orthodox Presbyterian Church, Calvary Orthodox Presbyterian Church of Wildwood and Rev. David B. Cummings, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court granting summary judgment to the State of New Jersey on certain issues and abstaining as to certain other issues.

## OPINIONS BELOW

The six published opinions in this dispute are found in *Presbytery v. Florio*, 60 Fair Empl. Prac. Cas. (BNA) 805, 1992 WL 414680 (D.N.J.), 135A; (*Presbytery I*), aff'd mem. 983 F.2d 1052 (3d Cir. 1992)(*Presbytery II*), 124A; *Presby-*

*tery v. Florio*, 830 F. Supp. 241 (D.N.J. 1993)(*Presbytery III*), 108A, rev'd in part, 40 F.3d 1454 (3d Cir. 1994) rehearing en banc denied (*Presbytery IV*), 71A; *Presbytery v. Florio*, 902 F. Supp. 492 (D.N.J. 1995)(*Presbytery V*), 14A, aff'd *Presbytery v. Whitman*, 99 F.3d 101 (3d Cir. 1996) (*Presbytery VI*), 1A.

All opinions are reprinted in the Appendix which accompanies this petition.

## JURISDICTION

Review is sought from the decision of the United States Court of Appeals for the Third Circuit entered on October 25, 1996.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in the Appendix, pages 148-161A, are U.S. Constitution Amendments I and XIV, and 42 U.S.C. § 1983, together with relevant provisions of the New Jersey Law Against Discrimination ("LAD"), N.J.Stat.Ann. § 10:5-12 (West 1993 and Supp. 1996) and a sign promulgated by the Respondent New Jersey Division of Civil Rights.

## STATEMENT OF THE CASE

In 1992, a lame duck session of the New Jersey legislature enacted gay rights amendments to its organic Law Against Discrimination, N.J.Stat.Ann. §§ 10:5-1 to 10:5-42 (West 1993 and Supp. 1996) ("LAD Amendments"). The LAD Amendments threatened the institutional autonomy of Petitioners' small traditional denomination, the freedom of its pastors to preach and teach on sexual immorality and the family, and the freedom of speech of its members. *Presbytery IV*, 40 F.3d at 1460, 79-80A. Having been forced in the past

to defend itself against San Francisco's original gay rights ordinance (which was declared unconstitutional by the California Superior Court as applied to the Church as a religious institution, *Walker v. First Orthodox Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal.Super.Ct. 1980)), the Petitioners initiated this declaratory judgment action for pre-enforcement review of the LAD Amendments on April 15, 1992, in the United States District Court for the District of New Jersey. Petitioners sought relief for the Church, its pastors and members to remove the chilling effect of the LAD Amendments on their Free Speech rights and to avoid potentially bankrupting and debilitating lawsuits for unlimited compensatory and punitive damages by private attorneys general. *Presbytery IV*, 40 F.3d at 1459-60, 76-82A. Suit was brought against the Governor and Attorney General of New Jersey, the head and members of its Division of Civil Rights and John and Jane Doe, the latter being private persons and organizations who are accorded favorable standing and other procedural rights under the LAD to seek enforcement of the LAD Amendments.[1] *Presbytery II*, 126A.

Because of obvious constitutional defects with the LAD as written, the defendant head of the New Jersey Division of Civil Rights, C. Gregory Stewart, immediately filed an interpretive affidavit (the "Stewart Affidavit") whereby the State absolutely waived enforcement of the recent gay rights amendments with reference to any aspect of the Church as an institution and for any preaching or teaching of its pastors within the Church. *Presbytery IV*, 40 F.3d at 1460-61, 80-81A; *Presbytery VI*, 99 F.3d at 104, 5A. This mooted those claims, 40 F.3d at 1461, 81-82A, and, under the judicial es-

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[1] The facial proscriptions of the LAD Amendments posed an unacceptable handicap on plaintiffs' Free Speech and Free Exercise rights, particularly when coupled with the exceptional threat posed by the LAD's 1990 empowerment of law reform organizations to sue for unlimited compensatory and punitive damages before civil juries.

toppel doctrine, removed those issues from this case. In light of this Court's intervening ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the issues were narrowed to unconstitutional overbreadth, content and viewpoint discrimination and the chilling effect of the gay rights amendments on the Free Speech rights of members of the denomination (*Presbytery IV*, 40 F.3d at 1464-70, 87-100A), making it a civil analogue of the criminal statute addressed in *R.A.V.*

A panel of the Third Circuit identified the subsections of LAD Section 10:5-12 that remained at issue in this case:

> (1) clauses (e) and (n) (153, 160A) which through incorporation facially prohibit "inciting, compelling or coercing," among other things, **printing** or **circulating** or **causing to be printed** or **circulated** any **statement** or **publication** which **expresses, directly or indirectly, any limitation, specification or discrimination** as to sexual orientation **or any intent to make any such limitation, specification or discrimination** [clause (c), 153A], or "**directly or indirectly** to **publish, circulate, issue, display**, post or mail any **written or printed communication**" to the same effect [clause (f), 153-154 A], or to engage in lawful boycotts [clause(n), 160A].
>
> (2) clauses (l), (m) and (n)(2) (159-160A) which facially make it unlawful to refuse to do business with persons on the basis of the proscribed categories provided that **the prohibition does not apply to** "refusals or other actions either pertaining to employee-employer collective bargaining, **labor disputes**, or unfair labor practices, or made or taken in connection with a **protest of unlawful discrimination or unlawful employment practices,**" clause (n)(2) (160A), for example.
>
> (3) clause (j) (158A) which facially mandates compelled speech on a particular viewpoint because it does not allow for a conscience exception.

*Presbytery IV*, 40 F.3d. at 1460, 1459, 80A, 77A, and *Presbytery VI*, 99 F.3d at 104, 5A.

On remand, the State of New Jersey sought to moot the remaining issues by filing another interpretive affidavit ("Stewart Affidavit II"), but the District Court ruled that the two Stewart Affidavits did not waive enforcement of the LAD Amendments under the incitement provisions of subsection (e), or the facially content and viewpoint discriminatory provisions of clauses (l), (m) and (n), or the sign (forced speech) provision of clause (j). *Presbytery V*, 902 F. Supp. at 506, 507, 31-33A. On a stipulated record, the District Court then granted summary judgment to the State of New Jersey on the merits of these issues, abstaining only on an as applied challenge. 70A.[2]

Despite the fact that the Third Circuit had recognized that this case involved core "oral advocacy and boycott," *Presbytery IV*, 40 F.3d at 1469, 97A, and although the District Court likewise acknowledged that the speech at issue was "political and religious," *Presbytery V*, 902 F. Supp. at 513, 523, 46A, 67A --- categories which are fully protected under the Free Speech Clause, *see Capital Square Review Bd. v. Pinette*, 515 U.S. ___, 115 S. Ct. 2440, 2447-51 (1995) --- another panel of the Third Circuit on its third review of the case dismissed the Petitioners' First Amendment challenge because it found, in conflict with important decisions of this Court, that the LAD presented no problem of substantial overbreadth and that the District Court should have abstained as to all other First Amendment issues.

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[2] Plaintiffs moved for summary judgment with affidavits which were unopposed by the Respondents except for the Stewart Affidavits. The allegations of the lengthy, fact-specific amended complaint were admitted by operation of law 10 days after the remand and mandate in *Presbytery IV*, 145A, since the state never filed a timely answer. F.R.Civ.P 12 (a)(4)(A), 8(d). The District Court was thus presented with a stipulated trial record on which it granted summary judgment to the State.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the panel failed to protect critical Free Speech rights from overbroad and facially discriminatory civil rights legislation outlawing discrimination based on sexual orientation. In light of the enactment of such legislation in an increasing number of states, this Court should correct constitutional excesses such as those in the present case where overbroad and impermissible facial distinctions based on content have crippled the expression of certain viewpoints, while favoring others.

The panel correctly recognized the power of the State to enact "[a]ntidiscrimination statutes [which] commonly seek to educate and to eliminate this sort of bias," *Presbytery VI*, 99 F.3d at 105, 8A, n.2, but failed to acknowledge the sensitive balance found in this Court's recent anti-discrimination holdings. Just as states also cannot trammel the constitutional rights of homosexuals by selective prohibitions on the expansion of protected civil rights categories [*Romer v. Evans*, 517 U.S. ___, 116 S. Ct. 1620 (1996)], states also cannot abridge First Amendment freedoms when enacting affirmative protections for homosexuals in civil rights statutes [*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. ___, 115 S. Ct. 2338 (1995)].

Here in adding sexual orientation as a protected category under its civil rights laws, the State of New Jersey transgressed the Petitioners' Free Speech and Equal Protection rights. Unlike its Federal counterpart found in Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2(a), 2000e-3(b)), which reaches only conduct, the LAD Amendments expressly proscribe speech and impose unlawful disabilities on the expression of certain viewpoints, while favoring others. The Amendments sweep "too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 127-28 (1992). They prohibit legitimate incitement and impose

viewpoint discrimination, *R.A.V. v. St. Paul, supra*; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. ___, 113 S. Ct. 2141, 2148 (1993); *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). They ban protected informational boycotts or other collective activity taken to protest policies or sexual activities covered by the LAD, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), impermissibly exempting labor union speech and speech favoring sexual orientation legislation from this ban, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); *R.A.V. v. St. Paul*, 505 U.S. at 382. And they force Petitioners' members to display signs with content that violates their freedom of conscience and religious belief. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. at 2347-41 (1995).

The court of appeals erred in its conclusory dismissal of these important claims. For the reasons set forth below, this Court should grant a writ of certiorari to consider and reverse the Third Circuit's resolution of these issues.

## I. The Third Circuit Opinion Denigrates the Overbreadth Doctrine and Devalues Important Free Speech Rights.

The court of appeals turned First Amendment overbreadth analysis on its head. Relying principally on a case involving a challenge to the regulation of signs on utility poles, *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), it found that the LAD properly reached **some** unprotected conduct and, therefore, could not be overbroad. However, anti-discrimination statutes always reach and proscribe unlawful discriminatory conduct, but what is extraordinary about the LAD is that it goes further and expressly proscribes

protected speech.[3] In reviewing statutes which **on their face** proscribe speech, "a court's first task" is not to determine whether the statute reaches some **unprotected** conduct, but whether the enactment reaches a substantial amount of constitutionally **protected** speech. *Bd. of Airport Commrs. v. Jews for Jesus*, 482 U.S. 569, 574 (1987); *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). Such an analysis is wholly missing from the panel opinion which posits an overbreadth standard that is virtually impossible to meet.

The plain language of LAD subsections (c), (e), (f), (l), (m) and (n) literally proscribes communicating ideas that are adverse to certain "sexual orientations." 153-154A, 159-160A. Subsection (e) punishes "any **statement[s]**" or "**publication[s]**" that "incite, compel or coerce" listeners to engage "directly" or "indirectly" in some prohibited "limitation," "specification" or "discrimination", or "any intent" to do so (to quote the statutory terms). A speaker can be charged not only for acting to "incite, compel or coerce" violations of sections (a) and (c) but also for "**printing**" or "**circulating**" "**statements**" that "express" any "limitation," "specification" or "discrimination" as to "sexual orientation." For example, the statement that "Presbyterians should not hire or rent to unrepentant homosexuals because to do so is sinful" can be severely penalized under the LAD, but the statement that "homophobic bigots should be fined or jailed for their failure to hire homosexuals" cannot be punished. Thus, by virtue of *simple advocacy*, the speaker and others like him who voice religious, political, philosophical or other sentiments against

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[3] The District Court noted that were the individual Petitioner to hold seminars, or print or circulate pamphlets, or make oral statements urging that Orthodox Presbyterian employers, upon pain of excommunication and eternal damnation, obey scriptural mandates and fire or refuse to hire sexual sinners in the workplace, an aggrieved party could sue both the employer and the Petitioner for violation of the LAD because the pamphlet or oral statements were arguably the catalyst for a firing or refusal to hire. *Presbytery V*, 902 F.Supp. at 506, 32A.

the protected category of sexual orientation dare do so in New Jersey only at substantial risk of civil punishment for transgressing the foregoing overbroad provisions of the LAD. The Third Circuit swept this patent overbreadth under the rug, erroneously concluding that because the law reached some proscribed conduct, it could not be substantially overbroad.[4]

The panel opinion is also grounded in material misstatements of the record. It significantly misstates that the Petitioners made no argument that "the protected activities of third parties not before the court might be drawn within the ambit of the [LAD]." *Presbytery VI*, 99 F.3d at 106, 9A. It also incorrectly asserts that Petitioners' "activities are no different from those of any other person who might assert a First Amendment challenge to the statute." *Id.* These statements are simply not true.

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[4] The substantial overbreadth of the LAD is illustrated by the plain meaning of statutory terms under applicable New Jersey case law or by reference to *Webster's Third New International Dictionary* (1966) ("*Webster's*"); *see, e.g., Williamson v. United States*, 512 U.S. ___, 114 S. Ct. 2431, 2434 (1994). In the recent case of *Baliko v. Stecker*, 645 A.2d 1218, 1223 (N.J. Super. Ct. App. Div. 1994), the New Jersey courts have defined the meaning of "aid" and "abet" under the LAD very broadly to *include* to "assist," "support," "encourage" and "incite." *Webster's* defines "compel" to include "to urge irresistibly by moral or social pressure" and "to force by personal temperament or other subjective considerations." *Webster's* at 463. "Incite" means "to move to a course of action| stir up| spur on| urge on." *Id.* at 1142. "Coerce" is defined to include "to effect, bring about, establish, or enforce by force, threat, or other pressure." *Id.* at 439. And "induce" means "to move and lead (as by persuasion or influence) <powers of persuasion that would have *induced* the atheist to religion>| prevail upon| influence, persuade." *Id.* at 1154. Like the invalidated policy against "verbal and nonverbal" discriminatory "behavior" in *Dambrot v. Central Michigan Univ.*, 55 F. 3d 1177, 1182 (6th Cir. 1995), which was "sweeping and seemingly drafted to include as much and as many types of conduct as possible," sections (e) and (n) on their face have a similar impermissibly overbroad scope and should have been held invalid as the policy was in that case.

The Petitioners specifically and repeatedly alleged in the complaint and argued in the briefing that the LAD Amendments adversely affected the rights of parties **not before** the court. 162-179A. In the present case, not only are the ideas and viewpoints of Petitioner Cummings unduly burdened by the LAD's overbreadth and its proscriptions on expression, so, too, are those of OPC members and those of other persons who for political, philosophical or social reasons conscientiously object to the LAD Amendments or view them as unwise, unsound social policy. *See, e.g.*, Finnis, "Law, Morality, and Sexual Orientation," 69 *Notre Dame L. Rev.* 1049 (1994).[5] Moreover, the classifications created by the LAD illustrate further that the statute's overbreadth "has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, 505 U.S. at 130. Accordingly, those who favor the protections granted by the LAD (for either homosexual, bisexual or heterosexual conduct outside of marriage) may speak in favor of such topics without the threat of punitive damages, bankrupting lawsuits or other civil penalties. On the other hand, the speech of Petitioner Cummings and persons sharing his viewpoint based on scriptural mandates, or the speech of third parties based on other viewpoints, is clearly unduly burdened by such threats and penalties.[6]

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[5] Petitioner had third-party standing under applicable First Amendment principles to challenge the facial validity of the LAD for these persons because whenever a regulation might "chill the expressive activity of others not before the Court, . . . the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where . . . the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. at 127-28 (citations omitted).

[6] The Third Circuit sought to distinguish a Sixth Circuit case invalidating a university's anti-discriminatory policy that was likewise directed at both speech and conduct by suggesting it was aimed only at "hate speech." *Presbytery VI*, 99 F.3d at 105, 8A. But this conclusion does not

The panel's puzzling observation that the Petitioners' "activities are no different from those of any other person who might assert a First Amendment challenge to the statute" is simply astounding. *Presbytery VI*, 99 F.3d at 106, 9A.[7] The Petitioners' opposition to unrepentant homosexual conduct and heterosexual sex outside marriage --- favored categories under the LAD --- is by definition "different" from viewpoints supporting the LAD's protections. Equally questionable is the panel's reliance on *City Council v. Taxpayers for Vincent*, *supra*, to support this holding. In that case, the overbreadth claim challenging sign regulations (which prohibited attachment of cardboard signs to horizontal crosswires on utility poles) was ineffective because the law imposed uniform restrictions on the placement of all signs whether they belonged to the Taxpayers or others. As such, an overbreadth challenge would be of limited, if any, legal effect and there was no selective chill on free speech. But here, the statutory overbreadth imposes a chill not only on the distinct viewpoints of Petitioner Cummings, but also on those of his fellow Church members and third parties who for reasons of conscience and social policy disagree with the State's favored viewpoint.

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square with the Sixth Circuit's finding that the university's anti-discrimination policy was "sweeping and seemingly drafted to include as much and as many types of *conduct* as possible." *Dambrot v. Central Mich. Univ.*, 55 F.3d at 1182 (emphasis added).

[7] In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984), the Court indicated that an overbreadth challenge may be brought by either of two classes of individuals: (1) those whose behavior may not always be protected by the First Amendment but who are challenging a substantially overbroad law, and (2) those who claim that application of the challenged law would directly violate their First Amendment rights.

## II. The Important Issues From Which The Third Circuit Abstained Should Be Reviewed On Certiorari By This Court

Despite the fact that the District Court reached the merits of the Petitioners' content and viewpoint discrimination claims --- finding them ineffective because of the "secondary effects" doctrine --- *and* the merits of the Petitioners' challenge to the boycott and forced speech provisions, the Third Circuit panel ignored these findings and, with sweeping strokes of legal reasoning, ruled that *Pullman* abstention should be applied to these issues. In view of the error of this ruling, which is discussed in more detail in Part III below, the Petitioners' challenge to the LAD Amendments on content and viewpoint discrimination, equal protection and compelled speech grounds should also be reviewed on certiorari.

**A. Content and Viewpoint Discrimination**. The LAD prohibits a substantial amount of protected speech because of its facial content and viewpoint discriminatory defects. It suffers from the same *content-based* defect found in the St. Paul ordinance in *R.A.V.* The discrimination is twofold. First, the LAD prohibits speech promoting discrimination based on the subject matter of the LAD proscribed categories, such as sexual orientation, sex, age, etc., but it imposes no facial restrictions on speech that promotes discrimination based on unenumerated categories, such as wealth or political persuasion. Thus, speech promoting discrimination concerning political or social affiliation, union or club membership, educational background or economic status, is permitted *without restriction*. But speech that promotes discrimination based on the LAD proscribed categories --- i.e. affectional or sexual orientation, age, etc. --- is *completely banned*.

However heinous the latter speech may appear to be, such content-based distinctions on speech are not permitted under *R.A.V.* and its progeny. The State may draw distinctions to prohibit discriminatory *conduct* in hiring and firing, and public accommodations, but it may *not* achieve its ends

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by expressly prohibiting *speech* that espouses or advocates such discrimination. In *R.A.V.* even "fighting words" could not be regulated. Thus the fatal flaw in the challenged provisions of the LAD is that, unlike federal civil rights laws which contain no such subsection (e) provision reaching speech, the LAD contains facial bans on pure speech keyed to the *content* of the discriminatory categories it seeks to protect, and it is not limited to conduct.

Second, and specifically with regard to Petitioners, the LAD favors speakers who support legal protection for affectional or sexual orientations, but penalizes the speech of those who oppose, and support discrimination against such behavior or who oppose legalizing protections against such discrimination. Speech advancing the viewpoint that sexual conduct should have moral limits is penalized while speech is permitted without penalty supporting unfettered sex without moral limits. As explained in *R.A.V.*, the LAD fosters facial viewpoint discrimination. *R.A.V.* 505 U.S. at 391-92. Here, those engaging in or inciting the "printing" or "circulating" of "statements" or "publications" containing injunctions against homosexual conduct or heterosexual sex outside marriage are threatened with severe civil penalties and liabilities, while those who similarly espouse other social, philosophical or psychological viewpoints favoring homosexual or promiscuous conduct are not only permitted, but in effect encouraged to promote such conduct on an unequal playing field in the marketplace of ideas. Government here has done more than simply educate the public about the evils of discrimination, it has fashioned a statutory regime that penalizes the speech of one side of this public debate. But it cannot do this under *R.A.V.* and other more recent cases such as *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. at 2148 ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") and *Rosenberger v. Univ. of Virginia*, 515 U. S. ___, 115 S. Ct. 2510, 2517-20 (1995).

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**B. Ban on Lawful Boycotts.** The LAD's facial exemption of boycotts for labor union speech and speech favoring homosexuality is inexorably problematic under equal protection principles. In *R.A.V.* this Court reaffirmed the *Police Department of Chicago v. Mosley*, doctrine and said that "government may not regulate use based on hostility or favoritism towards the underlying message expressed." 505 U.S. at 386. But, with its two facial content-based exceptions favoring labor union speech, and speech favoring homosexuality, sections 10:5-12(l), (m) and (n) prohibit *any "person"* from refusing to do business with others because of their "sexual orientation." It, therefore, precludes peaceful informational boycotts or other collective activity taken to protest the policies or sexual activities protected by the LAD, but permits, for example, boycotts of purported "homophobes" who assert that homosexual conduct is wrong. So under the LAD one can engage in an informational boycott favoring homosexuality by means of informational signs which say "Don't patronize this place because it won't hire homosexuals," but the State can punish informational boycotts with signs which say "Don't patronize this place, it hires people who engage in immoral sexual practices." But, such peaceful boycotts are clearly protected under the First Amendment. *N.A.A.C.P. v. Claiborne Hardware Co., supra*. Thus, the discriminatory anti-boycott provisions should have fallen under the *Claiborne* doctrine, but this precedent was ignored.

**C. Forced Speech by Mandatory Posting of Signs.** This Court in *Hurley v. Irish-American, supra*, recently reiterated in the context of a civil rights statute protecting homosexuals that government "may not compel affirmance of a belief with which the speaker disagrees [and] . . . this general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." 115 S. Ct. at 2347 (citations omitted). The Appendix (161A) contains a sign containing affirmative statements about non-discrimination against sexual orienta-

tion which was prepared by the New Jersey Division of Civil Rights for posting by employers or those who operate places of public accommodation. With the posting of this sign, those opposed to the newly enacted protected category are required to display and affirm statements which they consider ideological and conscientiously antithetical to their religious or moral convictions. The State's requirement poses a classic dilemma forcing individuals to choose between suffering penalties for violating the LAD or making statements contrary to their sincerely held religious convictions. This type of Hobson's choice is not permitted under the First Amendment and should not be sanctioned by this Court.[8]

The forced speech rule in *Hurley* is based upon a long line of precedent. Plaintiff Cummings and those he represents have a First Amendment "right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. at 714. The refusal to post is protected expressive conduct (*cf. Texas v. Johnson*, 491 U.S. 397 (1989)), and no different from the State of New Hampshire's impermissible mandate that motorists display the "Live Free or Die" slogan which this Court struck down in *Wooley*. Pre-enforcement declaratory relief on the merits of the compelled speech issue was accordingly appropriate since as a matter of law the current politically fashionable sexual orientation category is not so legally "compelling" that it outweighs freedom of conscience rooted in the Bill of Rights.

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[8] *Employment Div. v. Smith*, 494 U.S. 872, 880-82 (1990), citing *Wooley v. Maynard*, 430 U.S. 705 (1977); *Sherbert v. Verner*, 374 U.S. 398 (1963).

## III. The Third Circuit Mistakenly Applied the Abstention Doctrine.

Quite simply, *Pullman* abstention was improper because none of its three elements are found in this case. First, contrary to the panel's opinion, there are no uncertain issues of **state law** underlying the Petitioners' Free Speech claims. In reaching a contrary conclusion, the court's predicate is in error. It made the following egregious misstatement:

> Although there is some evidence that New Jersey would interpret this language in the Law Against Discrimination in the same manner as it does in the **criminal law context,** *see Baliko v. Stecker*, 465 A.2d 1218, 1223 (N.J. Super. Ct. App. Div. 1994), the New Jersey Supreme Court has interpreted the language "aid, abet, incite, compel or coerce" only once in the context of a First Amendment challenge, and that case involved *commercial* speech. See *Passaic Daily News v. Blair*, 308 A.2d 649 (N.J. 1973). . . .

*Presbytery VI*, 99 F.3d at 106-07, 11A. But the 1994 *Baliko* case was *not* a **criminal** case, it was a **civil** case involving direct application of the First Amendment to the offending provisions at issue herein. Moreover, as Petitioners have always contended, the New Jersey courts there clearly interpreted the "aiding and abetting" provisions most broadly to *include* anything that would "assist," "support," "encourage" and "incite." *Baliko v. Stecker*, 465 A.2d at 1223. Additionally, in the *Passaic* case, the New Jersey Supreme Court accorded the LAD's "aiding and abetting" provisions broad application in a First Amendment context and in another case reversed a lower court which narrowly construed a statute to avoid its impact on a religious entity. *See Market St. Mission v. Bureau of Rooming & Boarding House Standards*, 541 A.2d 668 (N.J. 1988), appeal dismissed, 488 U.S. 882 (1988). In light of these recent decisions by the New Jersey courts, the panel's finding that there are open issues of state law was based on a faulty factual predicate and was clearly erroneous.

Secondly, the offending provisions of the LAD are *not* amenable to any state court interpretation that would obviate the need for or substantially narrow federal court adjudication. They are quite plain and unambiguous as written. The District Court unequivocally found that the State had not waived enforcement of these provisions. *Presbytery V*, 902 F. Supp. 506, 507, 31-34A. The challenged portions of the LAD simply are not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harmon v. Forssenius*, 380 U.S. 528, 535 (1965).[9] The only option for a State court would be to invalidate the offending provisions and read them out of existence to the extent that they affect pure speech. But abstention is improper merely to give a state court the first opportunity to hold that a statute violates the federal constitution:

> We have held that "abstention. . .is inappropriate for cases [where]. . .statutes are justifiably attacked on their face as abridging free expression." "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

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[9] The problems in adopting a limiting construction are not unlike those found in *Baggett v. Bullitt*, 377 U.S. 360 (1964), which involved the constitutionality of several statutes requiring loyalty oaths. The *Baggett* Court held that abstention would serve no purpose given the lack of any limiting construction, and found the statutes unconstitutional on their face under the overbreadth doctrine. The Court noted that the challenged loyalty oath was not "open to one or a few interpretations, but to an indefinite number," and concluded that "[i]t is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty." Id. at 378. It is hard to imagine in the present case that the LAD could be limited by anything less than a series of adjudications, and the chilling effect of the LAD on protected speech in the meantime would make such case-by-case adjudication intolerable.

*City of Houston v. Hill*, 482 U.S. at 467 (citations omitted); *accord*, *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971)("where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim"); *Zwickler v. Koota*, 389 U.S. 241, 250-51, 254 (1967) ("[T]he abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression."); *City of Houston v. Hill*, 482 U.S. at 468 ("If the statute is not obviously susceptible of a limiting construction, then even if the statute has 'never [been] interpreted by a state tribunal . . . it is the duty of the federal court to exercise its properly invoked jurisdiction.' ")[10]

Lastly, a declaratory judgment concerning pure speech or the right to conscience would not disrupt any important State policy through an erroneous construction of State law. The present case only challenges the regulation of speech and not pure conduct. The State has no important State interest in regulating such speech. And since the LAD could follow the traditional, more narrowly tailored and strictly conduct-based Title VII scheme to prevent discrimination, it is clear that adequate, less restrictive means already exist as a matter of law for advancing the state's purported compelling state interest in removing discrimination. A federal adjudication of the offending proscriptions on speech will not adversely affect New Jersey's policies against discriminatory "conduct."

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[10] *Procunier v. Martinez*, 416 U.S. 396, 400-401 (1974); *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 756 (1986)("when the unconstitutionality of the particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue pending state-court review." [citations omitted]); *Zablocki v. Redhail*, 434 U.S. 374, 379 n. 5 (1978); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 271 n. 4 (1977).

## CONCLUSION

For the reasons set forth above, Petitioners pray that their Petition For A Writ of Certiorari be granted and that this Court decide the issues raised in the Petition.

Respectfully submitted,

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DATED: January 22, 1997.

# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 95-5706

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PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation; CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey corporation; REV. DAVID B. CUMMINGS,

*Appellants*

v.

CHRISTINE TODD WHITMAN,* GOVERNOR OF NEW JERSEY, in her official capacity; PETER VERNIERO,* ATTORNEY GENERAL OF NEW JERSEY, in his official capacity; MARILYN FLANZBAUM; ROMAN ANGEL; BETTY CARSON; OLGA L. VAZQUEZ-CLOUGH; FELTON LINGO, SR.; REINHOLD W. SMYCZEK; CASEY TAM, all in their official capacities as members of THE DIVISION ON CIVIL RIGHTS; C. GREGORY STEWART, in his official capacity as executive of THE DIVISION ON CIVIL RIGHTS; JOHN DOE(S), JANE DOE(S), addresses unknown, the last two being fictitious names, the real names of said defendants being presently unknown or known only in part to plaintiffs, said fictitious names being intended to designate organizations, persons and others acting in concert with any of the defendants who engage in, are engaged in, or who intend to engage in, the conduct of defendants complained of herein, or who would have the right to file or seek enforcement of administrative, equitable or legal complaints or suits or to assert any other legal claims or remedies or enforcement thereof against the plaintiffs under the New Jersey Law Against Discrimination, as amended by the 1992 affectional and sexual orientation amendments, and all others similarly situated.

(*Parties substituted pursuant to Fed R. App. P. 43(c)(1).)

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (D.C. CIVIL ACTION NO. 92-01641)**

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Argued June 28, 1996
Before: BECKER, NYGAARD and LEWIS, *Circuit Judges*
(Opinion filed October 25, 1996)

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## OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

The Presbytery of New Jersey of the Orthodox Presbyterian Church, Calvary Orthodox Presbyterian Church of Wildwood, and the Reverend David B. Cummings filed suit challenging the sexual orientation provisions of the New Jersey Law Against Discrimination. The district court dismissed their facial First Amendment challenge and abstained from deciding their "as applied" challenge. For reasons somewhat different from those given by the district court, we will affirm.

### I.

In 1992, the New Jersey Legislature added "affectional and sexual orientation" to the list of protected classes in its Law Against Discrimination. The amendments made it illegal to discriminate on the basis of sexual orientation in the employment relationship, in public accommodations, and in business dealings.

To appellants, the Law Against Discrimination amendments represented New Jersey's repudiation of 5,000 years of Judeo-Christian morality. They believed that the Law Against Discrimination's provisions forbidding aiding and abetting discrimination trammeled their rights to follow the tenets of their religion in their business dealings and to preach against immorality in general and homosexuality in particular. Accordingly, they filed this § 1983 action alleging that the 1992 amendments violated the First Amendment right of free speech, alleging that the amended Law Against Discrimination is both unconstitutionally overbroad and a content-based restriction on speech.

The facts underlying this dispute have been set forth several times by now. *See Presbytery v. Florio*, 60 F.E.P. Cases (BNA) 805, 1992 WL 414680 (D.N.J.), *aff'd mem.*, 983 F.2d

1052 (3d Cir. 1992) (*Presbytery I*); *Presbytery v. Florio*, 830 F. Supp. 241 (D.N.J. 1993), *rev'd in part*, 40 F.3d 1454 (3d Cir. 1994) (*Presbytery II*); *Presbytery v. Florio*, 902 F. Supp. 492 (D.N.J. 1995) (*Presbytery III*). Appellants assert that the theological doctrine of the Orthodox Presbyterian Church and its members is based strictly upon Biblical teachings. As such, appellants assert that this doctrine requires them to condemn homosexuality, both publicly and in their private lives and business dealings by speaking out against it and by avoiding those who engage in it. The sincerity with which these beliefs are held is not disputed.

The Law Against Discrimination amendments generally exempt religious organizations from their provisions regarding hiring. *See* N.J.S.A. § 10:5-12(a). Moreover, the director of the New Jersey Division on Civil Rights has stipulated that places of worship are not public accommodations within the meaning of the Law Against Discrimination and that Reverend Cummings would therefore not be subject to liability for discriminatory acts he might commit in his capacity as a pastor. Nevertheless, Cummings points to several provisions of the Law Against Discrimination which he believes could subject him and other religionists to suit in their capacities as private citizens: (1) N.J.S.A. § 10:5-12(e), which bans aiding and abetting, inciting, compelling or coercing another to perform a discriminatory act; (2) N.J.S.A. § 10:5-12(n), which generally forbids aiding and abetting a boycott; (3) N.J.S.A. § 10:5-12(j), which requires the posting of notices of nondiscrimination; and, (4) to the extent incorporated by the two aiding and abetting provisions, § 10:5-12(c) (proscribing employer from printing or circulating discriminatory statements), § 10:5-12(f) (in public accommodations), § 10:5-12(l) (prohibiting refusal to do business); § 10:5-12(h) (prohibiting requirement of boycott as condition of doing business).[1] For

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[1]The district court held that appellants had conceded that the scope of their suit was limited to N.J.S.A. §§ 10:5-12(e),(n) and (j) and such

example, appellants assert that if a person, following the tenets of his or her religion, circulated tracts condemning homosexuality and exhorting employers to discharge such persons, and if an employer read one of those tracts and acted upon it, the person who caused the tract to be printed could be held liable as an aider and abettor.

The district court first held that, while the challenges to the aiding and abetting prohibitions were ripe for review, the notice posting challenge was not. 902 F. Supp. at 503-09. Then, after determining that Reverend Cummings had both individual and third party standing, it proceeded to consider whether it should abstain from reaching the merits under the *Pullman* abstention doctrine. The court held that, to the extent appellants were asserting a valid facial challenge to the Law Against Discrimination, abstention would be improper, but it concluded ultimately that the Law Against Discrimination was not facially unconstitutional. *Id.* at 516-23. It then abstained as to the "as applied" challenge, but retained jurisdiction. *Id.* at 523.

## II.

The district court first considered whether appellants' facial challenge to the amended Law Against Discrimination was meritorious. It viewed this challenge as having two principal arguments: first, that the statute is unconstitutionally overbroad; and second, that it is an unconstitutional content-based, viewpoint-discriminatory restriction on speech. 902 F. Supp. at 516. It rejected the facial challenge because it believed that the Law Against Discrimination provisions at issue were capable of some constitutional application and because appellants had not demonstrated that the challenged provisions are overbroad. *Id.* at 516-17. The district court rejected

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other sections of the Law Against Discrimination as were incorporated by reference by those three subsections. Appellants do not challenge that ruling.

the viewpoint discrimination challenge under the "secondary effects" doctrine set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986), opining that, because the Law Against Discrimination provisions were not targeted at *speech* condemning homosexuality but rather the *effects* of discriminatory conduct, they passed constitutional muster because they were rational and served the substantial government interest of ending discrimination. *Id.* at 517-22.

**A.**

For the most part, we agree with the district court's analysis of appellants' facial challenge. In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118 (1984), the Supreme Court discussed facial invalidity under the First Amendment. First, it noted that a statute may be declared facially invalid if it is "apparent that *any* attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id.* at 797, 104 S. Ct. at 2124 (emphasis added). That is plainly not the case here. As the district court aptly noted under the aid and abet provision,

> the State could permissibly prohibit, for example, an individual from offering a $500 reward to employers for each time that they refuse to hire a gay or lesbian job applicant because of the applicant's sexual orientation. Such a reward scheme would have little to do with the expression of ideas and could legitimately be regulated by the state[.]

902 F. Supp. at 517. Likewise, a person who threatened a business if it refused to fire its gay employees could certainly be held liable as a "coercer" under the Law Against Discrimination without offending the Speech Clause.[2]

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[2] We reach a similar conclusion with respect to boycotts. One need not have a political or religious reason for refusing to do business

Appellants argue that this statute is indeed incapable of any constitutional application, relying on *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995), and *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). Those cases, however, are inapposite. Both involved university "hate speech codes" that explicitly purported to regulate speech and other protected First Amendment activity. Because protected activity was the *target* of these regulations, they had no constitutional application and were thus facially invalid.

Nor are we persuaded that *City of Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502 (1987), militates towards finding the Law Against Discrimination facially unconstitutional. In that case, a municipal ordinance made it "unlawful for any person to assault, strike, or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty," and the Supreme Court declared the statute unconstitutional on its face. *Id.* at 467, 107 S. Ct. at 2512. Appellants point to the unprotected conduct proscribed in that statute and argue that the fact that unprotected conduct is likewise regulated by the Law Against Discrimination cannot therefore foreclose a facial challenge to that statute. A careful reading of *Hill*, however, discloses that all of the prohibited conduct in that ordinance was preempted by the state criminal code, leaving only the speech restrictions intact as a matter of state law. That being the case, there were no constitutional appli-

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with a gay or lesbian individual. One might have an irrational and unfounded, but nevertheless subjectively real, fear of acquiring the HIV virus, or perhaps one might fear the potential loss of non-gay clientele. Antidiscrimination statutes commonly seek to educate and to eliminate this sort of bias without trammeling First Amendment interests; indeed, that is one of their principal purposes. We cannot conclude that the boycotting prohibitions are *incapable* of constitutional application in any context; of course, we express no view on whether these provisions violate the First Amendment as applied to appellants.

cations of the ordinance and the Supreme Court invalidated it on facial grounds. Here, the "conduct" restrictions are an integral part of New Jersey law and have been enforced for most of the last half-century. Accordingly, *Hill* is not dispositive.

Second, the *Vincent* court discussed overbreadth, the other way in which a statute might be found facially invalid:

> [T]he very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. This exception from the general rule is predicated on a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

*Id.* at 798-99, 104 S. Ct. at 2125 (internal citation and quotation marks omitted). Thus, the overbreadth doctrine permits a litigant whose own activities are unprotected to challenge the statute by claiming that is infringes the rights of others not before the court. In this case, however, appellants make no argument that, while their own activities may be unprotected, the protected activities of third parties not before the court might be drawn within the ambit of the Law Against Discrimination. Rather, it appears that appellants' activities are no different from those of any other person who might assert a First Amendment challenge to the statute. That is fatal to appellants' claim that the Law Against Discrimination is unconstitutionally overbroad. *Id.* at 801-02, 104 S. Ct. at 2127 (overbreadth challenge inappropriate where it appeared that, if ordinance could be validly applied to plaintiffs, it could be validly applied to anybody). Accordingly, we agree with the

district court that appellants have not presented a valid facial challenge to the Law Against Discrimination.

**B.**

That leaves appellants with an "as applied" challenge to the Law Against Discrimination, specifically appellants' argument that the Law Against Discrimination is an impermissible content-based restriction on speech. The district court apparently believed that this argument was part of appellants' facial challenge to the statute, since it engaged in a detailed legal analysis of the issue in that section of its opinion. *See* 902 F. Supp. at 517-22.

That analysis, however, was unnecessary, and consequently we express no view as to its correctness. Once the district court determined that the challenged Law Against Discrimination provisions were capable of some constitutional application and that they are not properly the subject of an overbreadth challenge, there was no remaining issue of facial invalidity to be decided.[3] Rather, whether the Law Against Discrimination was an unconstitutional content-based restraint on speech could only be determined within the context of its application to appellants. Thus, if the district court correctly abstained from deciding appellants' as applied challenge, its discussion of viewpoint discrimination and the secondary effects doctrine was unnecessary.

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[3]Appellants argue that "it is not . . . necessary that an entire statutory scheme be constitutionally offensive for portions of it to be invalidated on overbreadth grounds[,]" relying on *Brockett v. Spokane Arcades, Inc.*, 472 U.S 491, 105 S. Ct. 2794 (1985). That case is inapposite, however, because the Court resolved the First Amendment issue as an "as applied" challenge. *See id.* at 504, 105 S. Ct. at 2802. Likewise, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995), on which appellants also rely, the issue was not facial invalidity but how that law was applied to the particular facts (a parade) before the Court. *See id.* at 2347.

## C.

We believe that the district court correctly applied *Pullman* abstention. *Pullman* abstention may be employed "when a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, . . . [thus] avoid[ing] 'needless friction with state policies.' " *Chez Sez III Corp. v. Township of Union,* 945 F.2d 628, 631 (3d Cir. 1991) (quoting *Railroad Comm'n v. Pullman*, 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941)). As a matter of law, *Pullman* abstention requires the following special circumstances: (1) uncertain issues of state law underlying the federal constitutional claim; (2) state law issues subject to state court interpretation that could obviate the need to adjudicate or substantially narrow the scope of the federal constitutional claim; and (3) an erroneous construction of state law by the federal court would disrupt important state policies. *Chez Sez*, 945 F.2d at 631; *accord Hughes v. Lipscher*, 906 F.2d 961, 964 (3d Cir. 1990). If these special circumstances are all present, the court should make a "discretionary determination" as to whether abstention is appropriate under the circumstances, based on certain "equitable considerations." *Chez Sez*, 945 F.2d at 631. We find, as did the district court, that all three requirements are met here and that abstention is appropriate under these circumstances.

First, it is clear that the state law issues are uncertain. Although there is some evidence that New Jersey would interpret this language in the Law Against Discrimination in the same manner as it does in the criminal law context, *see Baliko v. Stecker*, 645 A.2d 1218, 1223 (N.J. Super. Ct. 1994), the New Jersey Supreme Court has interpreted the language "aid, abet, incite, compel or coerce" only once in the context of a First Amendment challenge, and that case involved *commercial* speech. See *Passaic Daily News v. Blair*, 308 A.2d 649 (N.J. 1973), in which the supreme court held that providing sex-segregated classified advertising columns aided employ-

ers' acts of sex discrimination. In sum, we simply do not know how the courts of New Jersey would interpret the "aid and abet" language.

Second, it is quite possible that the New Jersey courts would construe the challenged language so as to avoid reaching the type of conduct in which Reverend Cummings and others similarly situated engage. Indeed, the state agency responsible for the statute's enforcement has stipulated that the Law Against Discrimination should not be construed to reach speech protected under the First Amendment. Should the New Jersey courts agree (and it indeed appears that the agency's views would be entitled to considerable weight, *see Blair*, 308 A.2d at 654), it is likely that appellants' First Amendment claim would be substantially narrowed, if not eliminated entirely.

Third, the potential for disruption of important state policies is manifest. For many decades, the Law Against Discrimination has been a powerful tool in New Jersey's war against discrimination. Were we to erroneously construe it to reach appellants' conduct and then find it violative of the First Amendment, we could eviscerate the entire aiding and abetting prohibitions, not only for sexual orientation, but for race, gender and creed as well. *See* N.J.S.A. § 10:5-12(a).

Thus, we conclude that the district court had the power to abstain under the *Pullman* doctrine. Turning to the equitable factors, we also conclude that its application of *Pullman* abstention was a proper exercise of its discretion. Although abstention should generally not be applied to facial challenges, there is no such restriction with respect to an "as applied" challenge because there is less of a concern that protected activity will be inhibited if the court abstains from deciding the First Amendment issues. *Chez Sez*, 945 F.2d at 633-34.

Appellants point to the additional delay which they will suffer if they are forced to adjudicate their state law issues in

the New Jersey courts, relying on *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 140 (3d Cir. 1991), and *Biegenwald v. Fauver*, 882 F.2d 748, 750-51 (3rd Cir. 1989). *Stretton*, however, involved an imminent judicial election and the plaintiff in *Biegenwald* was under sentence of death. In both cases, abstention threatened any possibility of relief. The situation here is simply not that extreme.

Moreover, New Jersey law provides for declaratory relief when a person is unsure of the application of a statute. *See* N.J.S.A. § 2A:15-53. Thus, appellants had and continue to have the statutory opportunity to obtain a definitive construction of the Law Against Discrimination provisions at issue from the New Jersey courts. Thus, any delay is at least partly of appellants' own making, as they plainly possessed the right to seek a declaratory judgment in state court from the outset of this litigation and should have realized that federal court abstention was at least a possibility.

III.

Because appellants have not presented a valid facial challenge to the Law Against Discrimination and because the district court abstained properly from their "as applied" challenge, we will affirm.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

Civ. No. 92-1641 (WGB)

OPINION

THE PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, and REV. DAVID B. CUMMINGS,

*Plaintiffs,*

v.

JAMES FLORIO, ROBERT DEL TUFO, MARILYN FLANZBAUM, ROMAN ANGEL, BETTY CARSON, OLGA L. VASQUEZ-CLOUGH, FELTON LINGO, SR., REINHOLD W. SMYCZEK, CASEY TAM, C. GREGORY STEWART, JOHN DOE(S), and JANE DOE(S),

*Defendants.*

FILED: SEP 13 1995 at 8:30
William T. Walsh, Clerk

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[1] James E. Andrews as Stated Clerk of the Presbyterian Church (U.S.A.) General Assembly; the Diocesan Council of the Episcopal Diocese of Newark, Right Rev. John S. Spong, Bishop of the Episcopal Diocese of Newark; the Lutheran Office of Governmental Ministry in New Jersey; the New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations; the New Jersey Synod Council of the New Jersey Synod, Evangelical Lutheran Churches in America; the New Jersey Council of Churches; and the United Church of Christ Office for Church in Society.

BASSLER, DISTRICT JUDGE:

Plaintiff, Reverend David B. Cummings ("Reverend Cummings") moves for summary judgment declaring several provisions of the New Jersey Law Against Discrimination ( "NJLAD" ), N.J.S.A. §§ 10:5-1 - 10:5-42, which added the category of "affectational or sexual orientation" to the list of traits or characteristics protected against discrimination in, among other things, employment, business transactions, housing, and public accommodations. *See* N.J.S.A. § 10:5-12. Plaintiff claims that the NJLAD's prohibition against discrimination based upon "affectational or sexual orientation," both as written and as applied to him, violates the First Amendment to the United States Constitution.

In this action under 42 U.S.C. section 1983, Plaintiff asserts claims against several state officials responsible for enforcing the NJLAD, including Defendants, James Florio, Robert Del Tufo, Marilyn Flanzbaum, Roman Angel, Betty Carson, Olga L. Vasquez-Clough, Felton Lingo, Sr., Reinhold W. Smyczek, Casey Tam, and C. Gregory Stewart (collectively referred to as the "State Defendants").[2]

The Defendants move to dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1)

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[2] In this action under 42 U.S.C. § 1983, Plaintiff seeks relief from the State Defendants in their official capacities. When this action was filed in 1992, Defendants held the following offices in New Jersey's government: James Florio, Governor; Robert Del Tufo, Attorney General and board member, New Jersey Division on Civil Rights; Marilyn Flanzbaum, Roman Angel, Betty Carson, Olga L. Vasquez-Clough, Felton Lingo, Sr., Reinhold W. Smyczek, and Casey Tam, also board members of the New Jersey Division of Civil Rights; and C. Gregory Stewart, Director of the Division on Civil Rights. Although James Florio has since been replaced as governor by Christine Todd Whitman, and Robert Del Tufo by Deborah T. Poritz as Attorney General, Plaintiffs have not substituted the parties named as Defendants. When an officer sued in his or her official capacity ceases to hold office, "the officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d)(1)

and 12 (b)(6). Alternatively, the Defendants request this Court either to: (1) abstain from deciding the merits of this action based upon *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); or (2) issue a declaratory judgment adopting as definitive the interpretation of the NJLAD contained in the two affidavits of C. Gregory Stewart, Director, Division on Civil Rights.

If this case is ripe and Plaintiff possesses standing to maintain this action, this Court has jurisdiction under 28 U.S.C. sections 1331 and 1343. For the reasons set forth in this Opinion, Reverend Cummings' motion for summary judgment is **denied.** Additionally, Defendants' motion for a declaratory judgment is **denied.** Defendants' motion to dismiss is **granted in part and denied in part.** This Court **dismisses** all of Reverend Cummings' claims, except for his claim that N.J.S.A. sections 10:5-12e and n are unconstitutional as applied to him. This Court shall **abstain** from deciding the merits of Reverend Cummings' as applied challenge pending an adjudication in New Jersey state court.

## I. BACKGROUND

### A. *Plaintiffs' Challenge to the NJLAD*

In 1992, the New Jersey Legislature added "affectational and sexual orientation" to the list of personal characteristics protected against discrimination, which previously included race, creed, color, national origin, ancestry, age, sex, and marital status. N.J.S.A. § 10:5-12(a). As defined by the NJLAD, the category "affectational and sexual orientation" includes "male or female heterosexuality, homosexuality, or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such orientation." N.J.S.A. § 10: 5-5 (hh).

Shortly thereafter, Plaintiffs, the Presbytery of New Jersey of the Orthodox Presbyterian Church ("OPC"), Calvary Orthodox Presbyterian Church of Wildwood ("Calvary"), and

Reverend Cummings initiated this declaratory judgment action challenging the newly enacted prohibition against discrimination based upon "affectational and sexual orientation" on the ground that it violates the First, Fifth, Fourteenth, and Ninth Amendments to the United States Constitution.

Specifically, Plaintiffs sought to have seven provisions of the NJLAD declared unconstitutional. Two of the challenged provisions apply to employers: one makes it unlawful "to refuse to hire or employ or to bar or to discharge or require to retire" any individual based upon a characteristic protected by the NJLAD, N.J.S.A. § 10:5-12(a); the other bans printing or distributing statements that express, either directly or indirectly, that employment opportunities are restricted or limited for persons possessing protected characteristics, N.J.S.A. § 10:5-12(c). With respect to hiring decisions, however, the NJLAD expressly permits a religious organization to follow "the tenets of its religion in establishing and utilizing criteria for employment of an employee." N.J.S.A. § 10:5-12(a). Another provision of the NJLAD proscribes restricting access to public accommodations on the basis of protected traits. N.J.S.A. § 10:5-12(f). The NJLAD authorizes the Director of the New Jersey Division on Civil Rights to promulgate regulations requiring both employers and providers of public accommodations to post public notices informing employees and patrons of their rights under the NJLAD. N.J.S.A. § 10:5-12(j).

Furthermore, two provisions prohibit refusing to do business with an individual because of a protected characteristic. N.J.S.A. § 10:5-12(l),(m). To that end, the NJLAD makes it unlawful for anyone "to aid, abet, incite, compel, coerce, or induce" any prohibited discrimination in business transactions, including boycotting any person who refuses to engage in such unlawful activity. N.J.S.A. § 10:5-12(n). Finally, the NJLAD proscribes aiding, abetting and inciting any other conduct forbidden under the Act. N.J.S.A. § 10:5-12(e).

Moreover, the NJLAD provides several enforcement mechanisms, both public and private. By filing a complaint with the New Jersey Division on Civil Rights, an aggrieved person can initiate an investigation of the allegedly illegal practice that may prompt the State to commence an enforcement action. N.J.S.A. § 10:5-13 - 10:5-14.1. Alternatively, an aggrieved individual may proceed directly to state court. N.J.S.A. § 10:5-13. The NJLAD expressly confers standing upon "any individual who has been discriminated against" as well as "any organization which represents or acts to further the interests of those who have been discriminated against." N.J.S.A. § 10:5-38.

According to Plaintiffs, *The Holy Bible* and the OPC's doctrine require Plaintiffs and more than two thousand individual members of the OPC in New Jersey to condemn homosexuality, bisexuality, and heterosexual sex outside of marriage as "grievous sins." Amended Compl. ¶¶ 6, 22. Plaintiffs alleged that their religious beliefs require them to "draw reasonable distinctions" based upon permissible and impermissible sexual conduct. Amended Compl. ¶ 22.

As a result, Plaintiffs allege that they have directly and indirectly discriminated against persons based upon "sexual or affectational orientation," even after the 1992 amendments to the NJLAD made this conduct unlawful. Plaintiffs have allegedly committed several types of unlawful discriminatory conduct, including: speaking out, printing and disseminating publications that condemn homosexuality, bisexuality, and heterosexual sex outside of marriage as "an abomination and sinful;" inquiring about the sexual practices of their employees and refusing to employ anyone engaged in "sinful" sexual conduct; aiding and abetting discrimination against persons on the basis of their sexual conduct; and refusing to transact business with homosexuals, bisexuals, and heterosexuals having sex outside of marriage. Amended Compl. ¶¶ 49, 51, 57, 69.

Furthermore, Plaintiffs assert that OPC doctrine requires ministers and elders to discipline church members who are engaged in "sexual sin" or teach that "adultery or homosexuality [ar]e an acceptable lifestyle and that we [the OPC] should not 'discriminate' in our dealings with such people." Stevenson Aff. ¶ 6; *accord* Cummings Aff. ¶ 5. If an OPC member refused to abandon a "sexually sinful" lifestyle or to recant "heretical" statements, OPC ministers or elders would be obligated to file "formal disciplinary charges" against that member. Stevenson Aff. ¶ 7; *accord* Bahnsen Aff. ¶ 4. Disciplinary action could result in expulsion of the unrepentant church member from OPC facilities, functions, and sacraments, including "the Lord's Supper," baptism, and marriage. Amended Compl. ¶¶ 27, 29, 33, 34, 35.

B. *Procedural History*

Shortly after initiating this action, Plaintiffs requested this Court to issue a preliminary injunction precluding Defendants from enforcing the 1992 amendments to the NJLAD prohibiting discrimination based upon "affectational and sexual orientation" pending a determination of their constitutionality.

In opposition to Plaintiffs' application, Defendants relied upon the affidavit of C. Gregory Stewart, Director, New Jersey Division on Civil Rights (the "Division"), the agency charged with enforcing and applying the NJLAD. N.J.S.A. §§ 10:5-6, 10:5-9.1. As Director of the Division, Stewart is responsible for interpreting and construing the NJLAD with advice from the Attorney General. N.J.S.A. §§ 10:5-8d, 10:5-8g.

In the affidavit, Director Stewart set forth the Division's interpretation of relevant provisions of the NJLAD. In accordance with the Division's "longstanding construction" of the NJLAD, Director Stewart represented that "places of religious worship" are not public accommodations subject to the proscriptions of the NJLAD. Stewart Aff. ¶ 10. Additionally, the NJLAD expressly permits a religious organization to make

employment decisions based upon the "tenets" of the religion. N.J.S.A. § 10:5-12(a). Director Stewart indicated that the Division had no intention of construing the NJLAD to "tend or threaten to violate the sincere 'tenets' of any religion . . . [or] to engage in any determination or judgment as to what is or is not a 'tenet' of religious faith." Stewart Aff. ¶ 12. Finally, Director Stewart stated that because of First Amendment concerns, the Division "has not in the past prosecuted and has no intention to prosecute essentially exempt churches for sincerely held religious belief or practice, or speech consistent with such belief, or for a refusal to engage in certain speech or for following their religious tenets." Stewart Aff. ¶ 13.

This Court denied Plaintiffs' application for preliminary relief in an oral opinion rendered on June 19, 1992. Plaintiffs appealed this denial to the Third Circuit Court of Appeals, which affirmed this Court's decision in an unpublished memorandum opinion. *Presbytery of New Jersey v. Florio*, No. 92-5339, slip op. at 13 (Dec. 14, 1992) (*Presbytery I*), *see* 983 F. 2d 1052 (3d Cir. 1992) (Table).

After the Third Circuit's decision, this Court entertained Defendants' motion to dismiss the Amended Complaint on the grounds that Plaintiffs' lacked standing, their claims were not yet ripe for adjudication, and that *Pullman* abstention was appropriate. *See* 312 U.S. 496. In light of Director Stewart's affidavit, which clarified the Division's interpretation of the NJLAD, Plaintiffs conceded that the scope of their challenge to the 1992 amendments to the NJLAD had been limited to the following provisions: (1) N.J.S.A. § 10:5-12(e) (making it unlawful to aid and abet any violations of the Act); (2) N.J.S.A. § 10:5-12(n) (prohibiting aiding and abetting refusals to do business, including boycotts); and (3) N.J.S.A. § 10:5-12(j) (requiring posting of notices). *Presbytery II*, 830 F. Supp. at 247; 40 F.3d at 1461. Plaintiffs argued that the first two sections impermissibly restrict freedom of speech, while the third provision, by compelling

forced speech, violates their freedom of conscience. *Presbytery II*, 830 F. Supp. at 247.

In granting the motion to dismiss, this Court concluded that Plaintiffs' claims were not ripe. *Presbytery of New Jersey v. Florio*, 830 F. Supp. 241, 250 (D.N.J. 1993), *rev'd in part*, 40 F. 3d 1454 (3d Cir. 1994) [hereinafter *Presbytery II*]. Based upon the Stewart Affidavit, this Court concluded that the State had waived enforcement of the NJLAD against both the institutional Plaintiffs and Reverend Cummings for any discrimination by them on the basis of "affectational or sexual orientation." *Presbytery II*, 830 F. Supp. at 249. Consequently, this Court determined that Plaintiffs did not face "a 'real and immediate' threat of enforcement" by the State as required to maintain a ripe declaratory judgment action. *Id.* (citing *Salvation Army v. New Jersey Dept. of Community Affairs*, 919 F.2d 183, 192 (3d Cir. 1990))

Similarly, this Court concluded that Plaintiffs had not substantiated their general allegation that the threat of private enforcement had chilled their religious expression with "evidence of a present and concrete effect" upon their discriminatory speech and conduct. *Id.* (citing *Salvation Army*, 919 F. 2d at 193). Therefore, Plaintiffs claims against the as yet unknown Defendants who might utilize the private enforcement provisions of the NJLAD were similarly unripe for adjudication. *Id.*

Since this Court dismissed Plaintiffs' Complaint as unripe, it did not reach the issues of standing and abstention.

In response to this Court's decision, Plaintiffs again appealed to the Third Circuit, which affirmed this Court's dismissal of the claims by the institutional Plaintiffs, the OPC and Calvary, but reversed with respect to Plaintiff Cummings. *Presbytery II*, 40 F.3d at 1470. The Third Circuit held that although the Amended Complaint consistently refers to Plaintiff Cummings as "Reverend," its allegations encompass allegedly illegal actions by Cummings in his institutional ca-

pacity as well as his personal life. *Presbytery II*, 40 F.3d at 1465-66. The Stewart affidavit, which continually refers to "religious organizations" and "exempt churches," waived prosecution of Reverend Cummings for actions taken in his official capacity as a minister. The affidavit did not, however, "disavow enforcement against the members of the church for their public activities nor does it preclude enforcement against Cummings for his activities outside the Church." *Id.* at 1461. Consequently, the Third Circuit held that Reverend Cummings had presented a controversy ripe for adjudication. *Id.* at 1470.

II. DISCUSSION

On remand to this court, Reverend Cummings, the only remaining Plaintiff moves for summary judgment on the merits of his First Amendment challenge. Meanwhile, the Defendants have renewed their motion to dismiss on the grounds that Cummings' claims are not ripe for adjudication, he lacks standing and *Pullman* abstention is appropriate.

A. *Issues Before the Court for Resolution* —

As a threshold matter, this Court must identify which issues are properly before this Court for resolution. Defendants' have moved for a declaration, "adopting as definitive" the interpretations of the challenged provisions of the NJLAD contained in Director Stewart's affidavits. Def. Br. at 4. The Declaratory Judgment Act provides that federal courts "upon the filing of an appropriate pleading, may declare the rights and other legal relation of any interested party . . ." In fact, Defendants have not filed any pleadings in this action, having chosen to file two motions to dismiss in lieu of filing an answer. As a result, Defendants have not asserted any cross-claim or any other claim to affirmative relief. Since Defendants' have failed to file any pleading upon which a declaratory judgment could be based, their motion for a declaratory judgment is **denied.**

Furthermore, this Court must identify which provisions of the NJLAD remain before the Court for a determination of their constitutionality. Both before this Court and the Third Circuit, Plaintiff conceded that Director Stewart's initial affidavit narrowed the scope this challenge to three provisions of the NJLAD: (1) N.J.S.A. § 10:5-12e (prohibiting aiding and abetting violations of the Act); (2) N.J.S.A. § 10:5-12n (making it unlawful to aid and abet discriminatory refusals to do business, including through boycotting); and (3) N.J.S.A. § 10:5-12j (requiring posting of notices). *Presbytery II*, 830 F. Supp. at 247; 40 F. 3d at 1461. In spite of this prior concession, Plaintiff's Notice of Motion for Summary Judgment requests this Court to declare four additional provisions of the NJLAD unconstitutional: N.J.S.A. § 10:5-12(c) (prohibiting employers from distributing statements that restrict employment opportunities available to protected persons); N.J.S.A. § 10:5-12f (banning discriminatory limitations on access to public accommodations); and N.J.S.A. §§ 10:5-121 and m (making it unlawful to refuse to engage in business transactions or to extend credit based upon sexual orientation).

In an effort to convince this Court to rule upon the constitutionality of all seven provisions, Plaintiff contends that Director Stewart's supplemental affidavit "dramatically reverses the State's prior *enforcement* representations made to this Court and to the Third Circuit" P1. Letter Br. of 6/20/95, at 1. Plaintiff suggests that these alleged changes in the State's enforcement policy have somehow reactivated his previously abandoned challenge to sections 10:5-12c and f. Plaintiff offers no explanation for his renewed challenge to the provisions of the NJLAD that prohibit "direct" discrimination in business transactions, N.J.S.A. §§ 10:5-121 and m.

In fact, Director Stewart's supplemental affidavit adds little, if anything, to the plain language of N.J.S.A. sections 10:5-12c and f. In the supplemental affidavit, Director Stewart argues that the Amended Complaint fails to allege

that either Reverend Cummings or any members of the OPC are covered employers or public accommodations subject to the requirements of the NJLAD. Stewart Supp. Aff. ¶¶ 19-20. In making this argument, Director Stewart does not enunciate any new State enforcement policy; he merely provides an interpretation of the existing statutory language. Whether this Court adopts Director Stewart's interpretation depends upon whether it comports with definitions of "employer" and "public accommodation" provided by the NJLAD itself. *See* N.J.S.A. § 10:5-5e, 1.

Therefore, it is the law of this case that Plaintiff has narrowed the scope of his original challenge to the NJLAD to the following provisions: N.J.S.A. §§ 10:5-12e, n and j. Since Plaintiff has previously abandoned his direct challenge to N.J.S.A. section 10:5-12c,f,1 and m, the State Defendants' motion to dismiss these claims is granted. These four provisions, however, remain indirectly before the Court to the extent that they are incorporated by reference into the challenged aid and abet provisions, N.J.S.A. sections 10:5-12e and n.

B. *Justiciability*

Federal courts possess the power to resolve only actual "cases" or "controversies." U.S. CONST., art. III, § 2. Both outgrowths of the "case" or "controversy" requirement, the justiciability doctrines of standing and ripeness relate not only to a federal court's power to adjudicate a particular controversy, but also to the wisdom of its doing so. *Presbytery II*, 40 F.3d at 1462. The Defendants contend that the Amended Complaint fails to meet both of these constitutional prerequisites for judicial action.

Standing relates to "who is a proper party to litigate a particular matter, ripeness [doctrine] . . . determine[s] when that litigation may occur. Specifically . . . [it] seeks to separate matters that are premature for review because the injury is speculative and may never occur, from those cases that are

appropriate for federal court action." Erwin Chemerinsky, *Federal Jurisdiction*, § 2.4 (1989).

1. *Ripeness*

In response to the Third Circuit's ruling, the Defendants have submitted a supplemental affidavit from Director Stewart, further elaborating upon the Division's interpretation of the NJLAD. In so doing, the Defendants argue that they have eliminated any "real and immediate" threat of [state] enforcement" against Reverend Cummings and other religiously motivated persons under the aid and abet and boycott provisions of the NJLAD. *See Salvation Army*, 919 F.2d at 192. As a result, this Court must once again assess whether Reverend Cummings' claims are ripe for adjudication.

A ripe case involves "a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). The purpose of ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

As enunciated by the Supreme Court, the decision whether a claim is ripe is governed by two considerations: "the fitness of issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. "[T]he prototypical case not yet ripe for adjudication involves a plaintiff who seeks preenforcement review of a statute." *Kessler Institute for Rehabilitation v. Borough of Essex Fells,* 876 F. Supp. 641, 657 (D.N.J. 1995) (citing Chemerinsky, § 2.4). Since pre-enforcement review is often pursued through a declaratory judgment action, ripeness is a special problem in this area. *See Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

As a result, the Third Circuit has adopted a three part test for determining whether pre-enforcement review is appropriate in the context of a declaratory judgment action. A court must examine: "[1] the adversity of the interests of the parties, [2] the conclusiveness of the judicial judgment, and [3] the practical help, or utility of that judgment." *Step-Saver Data Sys.. Inc. v. Wyse Tech.*, 912 F. 2d 643, 647 (3d Cir. 1990), *see also Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412-24 (3d Cir. 1992) [hereinafter *Armstrong*] (noting that these factors are not exclusive).

In order to establish the first factor, an adversity of interest, a party "need not have suffered a 'completed harm.' " *Presbytery II*, 40 F.3d at 1463 (citing *Armstrong*, 961 F.2d at 412). Adversity of interest exists where a plaintiff faces "a substantial threat of real harm . . . that . . . remain[s] 'real and immediate' throughout the course of the litigation." *Id.* (citing *Salvation Army*, 919 F.2d at 192). If "intervening events remove the possibility of harm," a court should not address the now speculative controversy. *Id.* (citations omitted).

The second factor, conclusiveness, derives from the requirement that a ripe controversy must be remediable "through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." *Aetna Life Ins. Co.*, 300 U.S. at 240. "A declaratory judgment granted in the absence of a concrete set of facts would itself be a 'contingency' and applying it to actual controversies which subsequently arise would be an 'exercise in futility.' " *Presbytery II*, 40 F.3d at 1463 (citing *Armstrong*, 961 F.2d at 412). The need for a "concrete set of facts" varies. *Armstrong*, 961 F.2d at 421. The Supreme Court has held that the "actual factual setting" is important in cases alleging unconstitutional takings, see *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981), while "a factual record is not as important where the question is 'predominantly legal." *Armstrong*, 961 F. 2d at 421 (quoting *Pacific Gas & Elec. Co. v. State Energy Re-*

*sources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983)).

Regarding the third factor, utility, this requirement is met where "the court is convinced that [by its action] a useful purpose will be served." *Step-Saver*, 912 F.2d at 649 (citations omitted). The court should assess the utility of a judgment in terms of "whether the parties' plans of actions are likely to be affected by a declaratory judgment." *Id.* at 649 n . 9.

Finally, these three factors are not the only relevant considerations in determining whether judicial intervention is appropriate. As an additional factor, the Supreme Court has considered whether "[p]ostponing consideration of the question presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe [the challenged provisions] . . . and perhaps in the process to 'materially alter the question to be decided.' " *Renne v. Geary*, 501 U.S. 312, 323 (1991) (citations omitted).

a. *Adversity of Interest*

In deciding this motion to dismiss, this Court must accept all factual allegations contained in the Amended Complaint as true and draw all reasonable inferences therefrom in favor of the Plaintiff. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). "The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief." *Presbytery II*, 40 F.3d at 1465 (quoting *Colburne v. Upper Darby Township*, 838 F. 2d 663, 665-66 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989)).

In holding that Cummings had presented a ripe controversy, the Third Circuit specifically expressed concern that the initial Stewart Affidavit did not obviate the threat that Reverend Cummings would be prosecuted if he, in his individual capacity, engaged in the acts alleged in paragraphs 49, 51, 57, and 69 of the Amended Complaint. *Presbytery II*, 40

F.3d at 1469. These acts include: speaking out and lobbying against homosexuality and other "sexual sins," Amended Compl. ¶¶ 49, 51; printing and disseminating materials that condemn these sexual practices, Amended Compl. ¶ 49; inquiring about the sexual practices of prospective employees; refusing to hire anyone committing "sexual sins," Amended Compl. ¶ 69; making reasonable distinctions based upon these sexual practices, Amended Compl. ¶ 51, 69; aiding and abetting discrimination against homosexuals, bisexuals and heterosexuals having sex outside of marriage, Amended Compl. ¶ 51; and refusing to "buy from, contract with, or otherwise do business with persons based upon that person's homosexual, bisexual, or heterosexual practices," Amended Compl. ¶ 57.

In deciding the pending motions, the Court must determine whether Director Stewart's supplemental affidavit has eliminated this "real and immediate" threat of Reverend Cummings being prosecuted for these discriminatory activities alleged in the Amended Complaint. *See Salvation Army*, 919 F.2d at 192. If Director Stewart's supplemental affidavit insulates Reverend Cummings' allegedly discriminatory activities from prosecution, then this intervening interpretation of the NJLAD, offered by the State, has "remove[d]-the possibility of harm" and this Court should not address the merits of this now speculative controversy. *Presbytery II*, 40 F.3d at 1463 (*citing Armstrong*, 961 F. 2d at 412).

As a statement of general policy, Director Stewart maintains that the NJLAD does not apply to First Amendment protected speech that is unaccompanied by conduct in violation of the Act. Stewart Supp. Aff. ¶ 6. In other words, no one will be subject to prosecution under the NJLAD for "pure speech" that falls within the scope of the First Amendment's protections, regardless of its content and "wherever it may take place, in the 'pulpit' or outside of it." Stewart Supp. Aff. ¶¶ 8, 7, 6. Similarly, Director Stewart reaffirms that NJLAD does not authorize prosecution of anyone for either

engaging or refusing to engage in speech based upon religious principle and belief. Stewart Supp. Aff. ¶ 7 (quoting Stewart Aff. ¶ 13). Rather, Director Stewart construes the NJLAD as prohibiting only: (1) "pure" speech that falls outside of the First Amendment's protection for a reason other than its discriminatory content; and (2) speech that is accompanied by conduct violative of the NJLAD. Stewart Supp. Aff. ¶¶ 6, 14.

Applying these general principles, Director Stewart construes N.J.S.A. section 10:5-12e, which makes it unlawful to "aid, abet, incite, compel or coerce" acts prohibited by the NJLAD, "or to attempt to do so," to require either speech that is not constitutionally protected or actions unlawful under the NJLAD.

To date, no reported or unreported decision has interpreted the prohibition against inciting violations of the NJLAD. N.J.S.A. § 10:5-12e; Stewart Supp. Aff. ¶ 14. If this incitement provision is ever enforced, Director Stewart assures that it "must be and will be read consistently with current First Amendment law" applying only to speech that is not protected by the First Amendment because it is "'directed to inciting or producing imminent lawless action and is likely to produce such action.'" Stewart Supp. Aff. ¶ 14 (citing *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (per curiam)). Under this interpretation, illegal incitement to discriminate under the NJLAD would not include "expressions of . . . opposition to the mere existence of the law or to the people who happen to be included within any of the protected categories of the law, and advocacy that it be repealed or violated." Stewart Supp. Aff. ¶ 14.

Moreover, Director Stewart maintains that section 10:5-12e requires more than just speech to constitute illegal "aiding and abetting." Instead, section 10:5-12e "requires action which assists, supports, and supplements the action of another in conduct" that violates the NJLAD. Stewart Supp. Aff. ¶ 12.

Even under Director Stewart's interpretation of N.J.S.A. section 10:5-12e, Reverend Cummings and other OPC members face a real and immediate threat of prosecution if they engage in the activities alleged in the Amended Complaint. Plaintiff disavows any intention to engage in advocacy directed to and likely to result in "imminent lawless action," Pl. Br. at 32, which would be subject to prosecution under Director Stewart's interpretation of N.J.S.A. § 10:5-12e. Stewart Supp. Aff. ¶ 14 (citing *Brandenburg*, 395 U.S. at 447). Therefore, Plaintiff does not face any real threat of prosecution for incitement. Plaintiff's Amended Complaint specifically alleges, however, that Reverend Cummings and other OPC members intend to aid and abet discrimination against homosexuals, bisexuals, and heterosexuals engaged in sex outside of marriage, which is prohibited by the NJLAD. Amended Compl. ¶¶ 51.

Rather than accept Plaintiff's allegation that he and other OPC members intend to "aid and abet" discrimination on its face, the Defendants urge the Court to examine the specific types of allegedly prohibited conduct cited in the Amended Complaint. Director Stewart claims that the Amended Complaint merely alleges that Reverend Cummings and others intend to encourage discrimination against persons engaged in "sexual sin" through "pure" First Amendment protected speech. Stewart Supp. Aff. ¶¶ 11, 12. Speech alone, unaccompanied by action that "assists, supports and supplements" another's actions in violation of the NJLAD, does not constitute unlawful aiding and abetting under section 10:5-12e as construed by the Division. Stewart Supp. Aff. ¶ 12.

Contrary to Director Stewart's characterization, Plaintiff has alleged conduct that satisfies Director Stewart's interpretation of aiding and abetting and thus could result in prosecution. Plaintiff alleges that he and other members of the OPC are employers subject to the NJLAD. Amended Compl. ¶ 67; *see also* ¶ 51. In addition, Plaintiff alleges that he and other OPC members "publish, circulate, issue, dis-

play, post and mail printed material condemning homosexuality, bisexuality, and heterosexual sex outside of marriage." ¶¶ 53, 51. Consistent with these allegations, Reverend Cummings could print a leaflet encouraging discrimination based upon "affectational or sexual orientation" and give it to an OPC member who is an employer. If that employer distributed it to prospective employees, that employer would have violated N.J.S.A. § 10:-12c, which prohibits circulating statements that directly or indirectly indicate that employment opportunities will be discriminatorily limited based upon an applicant's sexual orientation. By printing and providing the leaflet to the employer, Reverend Cummings would have "assist[ed], support[ed] and supplement[ed]" the employer's conduct of distributing the leaflet in violation of the NJLAD. *See* N.J.S.A. § 10:5-12c. Therefore, such conduct by Reverend Cummings would constitute unlawfully aiding and abetting another in conduct violative of the NJLAD as those terms have been construed by Director Stewart. Since Director Stewart's supplemental affidavit has failed to eliminate Reverend Cummings' "real and immediate" threat of prosecution under section 10:5-12e, the parties interests remain adverse in this respect. *See Salvation Army*, 919 F. 2d at 192.

In addition, Director Stewart's supplemental affidavit amplifies the Division's interpretation of the NJLAD provision that makes it unlawful to "aid, abet, incite, compel, coerce or induce" violations of the NJLAD provisions prohibiting discrimination in business or credit transactions, or "to attempt, or conspire to do so." N.J.S.A. § 10:5-12n (incorporating by reference N.J.S.A. §§ 10:5-121,m. Conduct prohibited under this section includes boycotting. N.J.S.A. § 10:5-12n(2). Director Stewart represents that this provision will be interpreted to prohibit "*only* such boycotts as are designed to achieve an unlawful objective, since such boycotts are not protected by the First Amendment." Stewart Supp. Aff. ¶ 16 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-920 (1982). In the absence of an unlawful ob-

jective, Director Stewart claims that the NJLAD permits people, subject to minor restrictions, "to picket, advocate, speak and distribute leaflets and other written material around and about businesses" of their choosing. Stewart Supp. Aff. ¶ 16.

With the supplemental affidavit, Director Stewart has completely failed to eliminate the "real and immediate" threat of prosecution under section 10:5-12n(2) that Reverend Cummings and other OPC members face. *See Salvation Army*, 919 F.2d at 192. Plaintiff alleges that OPC members like himself "refuse[] to knowingly buy from, contract with, or otherwise do business with persons on the basis of that person's homosexual, bisexual, or heterosexual practices." Amended Compl. ¶ 57. Plaintiff and the other OPC members evidence their disapproval of homosexual, bisexual and heterosexual persons engaged in sex outside of marriage by isolating and discriminating against such persons in business transactions. *See* Amended Compl. ¶¶ 24, 29. The NJLAD expressly states that this discriminatory objective is unlawful. N.J.S.A. §§ 10:5-121, m. Therefore, Director Stewart's representation that Plaintiff and others will not be prosecuted for boycotting or any other aiding and abetting discrimination in business transactions, unless it is directed toward an unlawful end, does not in any way insulate Plaintiff from prosecution. The parties' interests thus remain adverse with respect to enforcement of N.J.S.A. § 10: 5 - L 2 n .

With respect to N.J.S.A. section 10:5-12j, Director Stewart's supplemental affidavit represents that he has not promulgated any regulations requiring persons covered by the act to post notices informing the public that discrimination based upon "affectational or sexual orientation" is prohibited. The NJLAD authorizes the Director "by regulation [to] require" notice posting, but does not require him to do so. N.J.S.A. § 10:5-12j. Existing regulations require employers, real estate agents, and places of public accommodation to post notices informing the public that discrimination based upon traditionally protected characteristics, such as race, creed,

color, or national origin is prohibited. N.J.A.C. §§ 13:8-1.1-13:8-2.3. Although Director Stewart has not promulgated a regulation adding "affectational or sexual orientation" to that list, the Division prepared new notices to reflect the 1992 amendments to the NJLAD and some of these notices were distributed. Stewart Supp. Aff. ¶ 17. Director Stewart ordered distribution stopped "because of the absence of regulatory authorization." Stewart Supp. Aff. ¶ 17. Therefore, Director Stewart contends, no one is currently required to post notices stating that discrimination based upon "affectational or sexual orientation" is illegal. Stewart Supp. Aff. ¶ 17.

Since no law or existing regulation requires Plaintiff and other OPC members to post notices indicating that discrimination based upon sexual orientation in employment, public accommodations, and real estate transactions is illegal, Plaintiff has failed to demonstrate that his interests are currently adverse to those of the Defendants. Plaintiff has submitted a notice prepared by the Division to reflect the 1992 amendments to the NJLAD. P1. Br. Exh. 1. While this revised notice may suggest that Director Stewart intends to promulgate the necessary regulation, unless and until he does so, Plaintiff and other OPC members do not face a "real and immediate" threat of prosecution. *See Salvation Army*, 919 F.2d at 192. As a result, the parties do not possess adverse interests with respect to N.J.S.A. section 10:5-12j. Therefore, this factor weighs against finding that Reverend Cummings has presented a ripe controversy challenging the notice posting provision of the NJLAD.

Having reviewed Director Stewart's supplemental affidavit, the Court concludes that the State has failed to eliminate Reverend Cummings' "real and immediate" threat of prosecution for violating N.J.S.A. sections l0:5-12e and n. *See Salvation Army*, 919 F.2d at 192. Therefore, the adversity of the parties' interests with respect to these two provisions weighs in favor of this Court finding that this controversy is

ripe for review. *See Step-Saver Data Sys.*, 912 F.2d at 647. In contrast, the absence of such adversity of interests weighs against this Court issuing a decision on the merits of N.J.S.A. § 10:5-12j. *Id.*

b. *Conclusiveness*

The second factor, conclusiveness, requires this Court to determine whether Plaintiff's claims are amenable to resolution "through a decree of conclusive character," or if a decision by this Court would amount to no more than an advisory opinion based upon a hypothetical set of facts. *Aetna Life Ins. Co.*, 300 U.S. at 240; *see also Presbytery II*, 40 F. 3d at 1468. While "predominantly legal questions are generally amenable to resolution in a pre-enforcement context," the presence of a purely legal question, in itself, does not render a case ripe for review. *See Presbytery II*, 40 F.3d at 1468 (citations omitted). In assessing the conclusiveness of judicial action, courts should consider whether the parties' claims are likely to change substantially in future litigation, whether "the current parties were appropriate to raise the issues at bar . . . [and whether] the parties would be subject to enforcement." *Id.* (citing *Atlanta Gas Light Co. v. United States Dept. of Energy*, 666 F.2d 1359, 1363 n. 7 (11th Cir.), *cert. denied*, 459 U.S. 836 (1982).

Since Plaintiff mounts a facial challenge to constitutionality of these three NJLAD provisions, factual development would add little, if anything, to resolution of Plaintiff's First Amendment claims. *Presbytery II*, 40 F.3d at 1468, 1469. Moreover, Reverend Cummings alleges that he and other OPC members currently engage in prohibited activities and intend to do so in the future. Future claims by Reverend Cummings or others sharing his desire to discriminate based upon sexual orientation "would most likely parallel those claims already presented . . . [making it] unlikely that there would be any change in the substance or clarity of the challenges" to the NJLAD. *Id.* at 1469. As previously discussed, Reverend Cummings would be subject to prosecution under

the aid and abet provisions, N.J.S.A. sections 10:5-12e and n, for the activities alleged in the Amended Complaint. In contrast, the notice posting provision, N.J.S.A. section 10:5-12j, could not be enforced against Reverend Cummings because existing regulations do not require him to post a notice stating that discrimination based upon "affectational or sexual orientation" is prohibited. Stewart Supp. Aff. ¶ 18.

Having assessed the applicable criteria, this Court concludes that the second *Step-Saver* factor, conclusivity, weighs in favor of finding that Plaintiff's challenges to the two aid and abet provisions, N.J.S.A. sections 10:5-12e and n are ripe for review. *See Step-Saver*, 912 F.2d at 649. In contrast, a decision on Reverend Cummings' challenge to the notice posting provision would be merely an advisory opinion, based upon a hypothetical regulation requiring him to post a notice stating that discrimination based upon sexual orientation is unlawful. Since no such regulation currently exists, Reverend Cummings would not be subject to prosecution for refusing to post a notice that is inconsistent with his religious beliefs. Therefore, the lack of conclusiveness weighs against finding that Reverend Cummings' challenge to N.J.S.A. section 10:5-2j is ripe for review.

c. *Utility*

In assessing the third *Step-Saver* factor, the utility resolving the facial challenge to a statute, a court should consider "whether the parties' plans of actions are likely to be affected by a declaratory judgment." *Step-Saver*, 912 F.2d at 649 n.9. Entry of a declaratory judgment would affect the State's enforcement policies with respect to the aid and abet provisions. N.J.S.A. §§ 10:5-12e, n. Although Reverend Cummings alleges that he will continue to engage in allegedly prohibited activities in spite of the risk that he will be prosecuted, "his willingness to do so is likely to be affected by resolution of this action." *Presbytery II*, 40 F.3d at 1470. Since a declaration of Reverend Cummings' rights would permit him and "others who would seek to engage in similar

activity . . . to speak without fear of governmental sanction or regulation of their activities," this third *Step-Saver* factor weighs in favor of holding that Plaintiff's challenge to the aid and abet provisions of the NJLAD re ripe. *Id.*; N.J.S.A. §§ 10:5-12e, n.

With respect to the notice posting provision, however, a decision by this Court is unlikely to affect the parties' conduct. Most importantly, the State concedes that N.J.S.A. section 10:5-12j cannot be enforced against persons, like Reverend Cummings, who refuse to display a notice stating that discrimination based upon sexual orientation is unlawful. Since this refusal is not unlawful, Reverend Cummings' conduct and his willingness to refuse to post such a notice a notice would not be affected in any way by a judicial decision. As a result, the third *Step-Saver* factor weighs against finding Reverend Cummings' challenge to the notice posting provision ripe.

d. *Summary of Conclusions*

Having applied the three part test enunciated in *Step-Saver*, this Court concludes that Reverend Cummings' claims challenging the constitutionality of the aid and abet provisions, N.J.S.A. sections 10:5-12e and n, are ripe for adjudication.

In contrast, all three *Step-Saver* factors weigh against judicial action on Reverend Cummings' challenge to the notice posting provision, N.J.S.A. section 10:5-12j. As an additional consideration, the Court notes that the Division has, in the past, made exceptions to the notice posting requirements in its regulations. For example, the regulation requiring notices to be posted by persons engaged in the sale of real estate contains an exception for a person who either sells or attempts to sell his own residence. N.J.A.C. § 13:8-1.3. The form which a regulation implementing the 1992 amendments takes, if any, could eliminate this controversy or "'materially alter the question to be decided.' " *Renne*, 501 U.S. at 323. Conse-

quently, a determination of the constitutionality of N.J.S.A. section 10:512j is best postponed "until a more concrete controversy arises." *See Id.* Accordingly, Plaintiff's challenge to N.J.S.A. section 10: 5-12 j is **dismissed** as unripe.

2. *Standing*

Like ripeness, standing is an outgrowth of the "case or controversy" requirement of Article III of the constitution. In order to invoke the jurisdiction of a federal court, a plaintiff must have "a personal stake in the outcome" of an otherwise justiciable controversy. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), U.S. Const., art. III, § 2, cl. 2. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and that the injury 'fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ' " *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (citations omitted).

In addition to these three constitutional requirements for standing, the Supreme Court has also identified several prudential standing principles that require a federal court to decline jurisdiction. Even where a party has satisfied the constitutional case or controversy requirement, these prudential requirements dictate that "the Plaintiff must generally assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499.

The Supreme Court has recognized several exceptions to the general rule against third party standing. *E.g., Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 957-59 (1984) (permitting professional fundraiser to challenge statute requiring charities to use 75% of monies raised for charitable purposes, rather than administrative expenses.) [hereinafter *Munson*]. Since a litigant who does not

possess Article III standing cannot assert the rights of others, the Court must first determine whether Reverend Cummings possesses standing to sue in his own right. *See Amato v. Wilentz*, 952 F.2d 742, 749 (3d Cir. 1991) (citaticns omitted).

a. *Reverend Cummings' Standing*

In *Presbytery II*, the Third Circuit noted that its determination that Reverend Cummings faced a real and immediate threat of prosecution led necessarily to the conclusion that he possessed standing to bring this action on his own behalf. 40 F. 3d at 1470n. 14. The Third Circuit expressly left open the question, however, of whether Reverend Cummings possessed standing to challenge the 1992 amendments to the NJLAD on behalf of other OPC members. *Id.*

According to the Defendants, Director Stewart's supplemental affidavit, by removing the threat that Reverend Cummings will be prosecuted for activities in his individual capacity, has eliminated Plaintiff's standing to bring this action either on in his own right or on behalf of OPC members. Since this Court has concluded that Reverend Cummings continues to face the threat of prosecution in spite of the supplemental affidavit, the Defendants' contention that he has lost standing lacks merit. *See Id.* at 1470. The "real and immediate threat" of prosecution that Reverend Cummings faces constitutes a concrete injury capable of supporting standing. *See Northeastern Fla. Chapter of Assoc. General Contractors of Am. v. City of of Jacksonville*, __ U.S. __ , 113 S. Ct. 2297, 2301-02 (1993). Moreover, this injury is traceable to the challenged statutory provisions and is likely to be redressed by a favorable decision. *See Id.* Therefore, the Third Circuit's conclusion that Reverend Cummings may sue in his own right remains valid.

b. *Third Party Standing*

With respect to the issue left open by the Third Circuit, Reverend Cummings maintains that this Court should not ap-

ply the prudential bar against third party standing and instead should permit him to assert the rights of OPC members.

Based upon Supreme Court precedent, the Third Circuit has identified three factors to be considered in determining whether a litigant has third party standing to assert the rights of others not before the Court. *Amato*, 952 F.2d at 749 (citations omitted). Courts should balance the following factors: (1) "the relationship between the plaintiff and the third party whose rights are asserted;" (2) "the ability of the third party to advance his own rights- whether some obstacle impedes the rightholder's own suit;" and (3) "the impact on third party interests- whether plaintiff and the third party have consistent interests." *Id.* at 749, 750 (citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989). Additionally, in the First Amendment context, the Supreme Court has held that the "fear of chilling expression . . . may at times outweigh the policies behind the general rule against third party standing." *Amato*, 952 F.2d at 748 (citing *Munson*, 467 U.S. at 977).

1) *Relationship and Consistency of Interests*

Although a close personal relationship is "neither necessary nor sufficient" to support third party standing, standing is more likely where the litigant and the third party possess some relationship "of special consequence." *Amato*, 945 F.2d at 751 (citations omitted). "The key aspects of the 'relationship' prong are thus a common link to the right asserted, consistency of the parties' interests, and effective advocacy- not the intimacy of the relationship per se." *Id.*

Since Reverend Cummings' claims in his official capacity have been dismissed, this Court must examine the relationship between Reverend Cummings as an individual and other OPC members. Reverend Cummings and other OPC members share a common link to their asserted right to aid and abet discrimination based upon affectational or sexual orien-

tation: their shared belief that such behavior and advocacy is required by OPC doctrine. Moreover, the Amended Complaint alleges that Reverend Cummings and other OPC members have and intend to continue to engage in similar activities that may violate the aid and abet provisions of the NJLAD. *See* Amended Compl. ¶ 12 (stating that allegations regarding "plaintiff(s)" include OPC members). As adherents to a common belief system, Reverend Cummings and other OPC members possess consistent interests in being able to express their belief that "sexual sins," including homosexuality, bisexuality, and sex outside of marriage are wrong. Furthermore, Reverend Cummings has shown himself to be an effective advocate in challenging the 1992 amendments to the NJLAD as violating the First Amendment. Therefore, the relationship between Reverend Cummings and other OPC members and the consistency of their interests both weigh in favor of third party standing.

2. *Obstacles*

Third party standing may be inappropriate where the party whose rights have allegedly been violated faces some impediment from bringing his or her own suit. *Id.* at 750. Such impediments range from "legal or physical inability to bring suit," which qualifies as an obstacle, to "a practical disincentive to sue . . . [which] may suffice although a mere disincentive makes for a less persuasive showing than an affirmative impediment." *Id.* (citations omitted).

Along the spectrum of impediments, those faced by OPC members fall close to the practical disincentive end, which does not necessarily suffice to support third party standing. Plaintiff does not allege that individual OPC members face any legal or physical inability to bring suit. Rather, he claims that the 1992 amendments to the NJLAD, adding affectational and sexual orientation to the list of protected characteristics have stigmatized OPC members for believing in and advocating discrimination based upon an individual's sexual practices. *See* Amended Compl. ¶ 10. In other words, Reverend

Cummings implicitly argues that the unpopularity of OPC members' beliefs impedes them from coming forward to assert their own First Amendment rights.

While this relatively mild disincentive might ordinary weigh against third party standing, in the First Amendment context, the lack of an obstacle is not dispositive in determining standing to challenge a statute as chilling free speech. *Munson*, 467 U.S. at 957. Therefore, even though other OPC members do not face a substantial obstacle to filing their own suits, the absence of such an impediment is not dispositive.

3) *Conclusions*

Balancing these relevant factors leads this Court to conclude that Reverend Cummings possesses third party standing to assert the First Amendment rights of other OPC members. The relationship between the parties, the consistency of their interests, and concern for the alleged chilling effect of the challenged NJLAD provisions weigh strongly in favor of third party standing.

C. *Pullman Abstention*

In an attempt to prevent this Court from adjudicating the merits of Plaintiff's challenge, the Defendants argue that this Court should *Pullman* abstain in order to provide the New Jersey Supreme Court an opportunity to construe the two aid and abet provisions, N.J.S.A. sections 10:5-12 e and n.

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). The Supreme Court has characterized abstention as:

> an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

*County of Alleqheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

Under *Pullman* abstention doctrine, where a federal court faces "both a federal constitutional question and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, abstention may be justified under principles of comity in order to avoid 'needless friction with state policies.' " *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991), *cert. denied*, 503 U.S. 907 (1992) (quoting *Pullman*, 312 U.S. at 500). By abstaining under *Pullman*, a court does not abdicate federal jurisdiction but merely postpones its exercise, thus avoiding unnecessary federal constitutional adjudication. *Harrison v. NAACP*, 360 U.S. 167, 177 (1959) (citations omitted). According to the Third Circuit, district courts must engage in a two-step analysis to decide whether to abstain under *Pullman*. First, a court must determine whether three "special circumstances" exist:

> (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court;
>
> (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims;
>
> (3) A federal court's erroneous construction of state law would be disruptive of important state policies.

*Hughes v. Lipscher*, 906 F.2d 961, 964 (3d Cir. 1990). Second, if all three special circumstances exist, the district court "must then make a discretionary determination as to whether abstention is in fact appropriate under the circumstances of the particular case, based upon the weight of these criteria and other relevant factors." *Chez Sez*, 945 F.2d at 631. Other relevant factors include: "the availability of an adequate state remedy, the length of time the litigation has been pending, and the potential impact on the parties caused by delay in ob-

taining a state ruling." *Stretton v. Disciplinary Review Bd. of the Supreme Court of Pennsylvania*, 944 F. 2d 137, 140 (3d Cir. 1991); *Biegenwald v. Fauver*, 882 F.2d 748, 750 (3d Cir. 1989).

1. *Uncertainty of State Law*

Before *Pullman* can apply, the state statute or local ordinance subject to federal constitutional challenge must be uncertain or ambiguous. Initially, a court should focus on whether the statutory language is "clear and unmistakable." Huqhes, 906 F. 2d at 965.

Both the Defendants and Reverend Cummings agree that the aid and abet provisions of the NJLAD are ambiguous. *See* N.J.S.A. §§ 10:5-12e,n. In fact, the Defendants' request for this Court to abstain is based upon the concession that key statutory provisions are not defined under the Act and are thus ambiguous. The NJLAD does not define aiding, abetting, coercing, or any of the other behavior that can trigger a violation of N.J.S.A. sections 10:5-12e and n. See N.J.S.A. § 10:5-5. Similarly, Reverend Cummings indicates that this declaratory judgment action stems from his uncertainty concerning the meaning of these statutory provisions, which has allegedly had chilling effect upon his advocacy in favor of discrimination based upon affectational and sexual orientation. Cummings Aff. ¶ 8 ("I do not know what these terms as used in the law are supposed to mean.").

Where the state courts have authoritatively construed an otherwise ambiguous statute, abstention is not appropriate. *United Services Auto Ass'n v. Muir*, 792 F.2d 356, 361 (3d Cir. 1986), *cert. denied, Grode v. United States Auto Ass'n*, 479 U.S. 1031 (1987) (citing *Kusper v. Pontikes*, 414 U.S. 51, 55-56 (1973)). Consequently, a court should not abstain where a prior authoritative state court decision forecloses the narrowing interpretation of the challenged statute offered by the party arguing in favor of abstention. *Kusper*, 414 U.S. at 55. In contrast, an administrative interpretation of a statute,

because it is not authoritative, cannot remove an ambiguity and prevent abstention under *Pullman*. *United Services Auto Ass'n*, 792 F.2d at 361; accord *Chez Sez*, 845 F.2d at 632.

Since Director Stewart's clarifying interpretations cannot authoritatively resolve statutory ambiguities, the Court must determine whether prior New Jersey Supreme Court decisions foreclose an interpretation of either N.J.S.A. section 10:5-12 e or n that would avoid the need for a decision on Plaintiff's constitutional claims.

With respect to N.J.S.A. section 10:5-12n, which prohibits aiding and abetting discrimination in business transactions, including through boycotting, this provision has never been interpreted by the New Jersey Supreme Court. The parties have not cited any published decision by a New Jersey court interpreting this provision nor has the Court's independent research uncovered any such opinions.

Regarding N.J.S.A. section 10:5-12e, however, the New Jersey Supreme Court has interpreted this provision specifically in the context of a First Amendment challenge. *The Passaic Dailv News Corp. v. Blair*, 63 N.J. 474 (1973). Several newspapers challenged an administrative regulation prohibiting publication of employment ads under column headings segregated by gender or any other characteristic protected by the NJLAD. *Id.* at 478. In addition, the regulation declared it a violation of the NJLAD to publish any employment ad that either directly or indirectly expressed an intent to discriminate against persons based upon protected characteristics like sex, unless the preference was based upon a bona fide occupational qualification. *Id.*

Characterizing the employment ads as commercial speech, the New Jersey Supreme Court held that the regulation prohibiting newspapers from segregating employment ads by gender did not unconstitutionally abridge freedom of the press under the First Amendment. *Id.* at 481. Moreover, the New Jersey Supreme Court held that the challenged regu-

lations fell within the Division's rule-making authority conferred by the NJLAD. *Id.* at 490. In so doing, the Court interpreted the term "aiding," as used in N.J.S.A. section 10:5-12e. *Id.* at 488. The Court concluded that "[t]o borrow . . . from definitions of aiding and abetting in the criminal field, where criminal intent is stressed because the abettor is a criminal principal, is entirely inappropriate in the context of the present statute which is basically a remedial, not a criminal one." *Id.*; *but see Baliko v. Stecker*, 275 N.J. Super. 182, 191 (App. Div. 1994) (relying upon the criminal definition of aiding and abetting in construing N.J.S.A. section 10:5-12e).

Although the New Jersey Supreme Court has interpreted N.J.S.A. section 10:5-12e, its interpretation does not foreclose any of the constructions proposed by Director Stewart to narrow or to eliminate Plaintiff's federal constitutional claims. Most importantly, *The Passaic Daily News* upheld the constitutionality of a regulation implementing N.J.S.A. section 10:5-12e as applied to commercial speech. *Id.* at 481-82. Commercial speech is entitled to substantially less constitutional protection than the politically and religiously motivated speech that Reverend Cummings and other OPC members allegedly engage in by speaking out against the NJLAD and "sexual sins." *See e.g., Central Hudson Gas & Electric v. Public Service comm'n*, 447 U.S. 557, 562-63 (1980); *Pittsburah Press Co. v. Pittsburah Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973) (holding that speech related to illegal commercial activity, discrimination in employment, is not constitutionally protected).

Since *Passaic Daily News* involved commercial speech, it does not dictate a particular outcome for Plaintiff's First Amendment challenge to the aid and abet provisions of the NJLAD. *See* N.J.S.A. §§ 10:5-12e, n. Moreover, the New Jersey Supreme Court's interpretation of N.J.S.A. section 10:5-12e does not foreclose Director Stewart's proposed limiting construction of the challenged aid and abet provisions as inapplicable to "pure" First Amendment protected speech that

is not accompanied by conduct in violation of the NJLAD. *See* Stewart Supp. Aff. ¶¶ 6, 14.

In the absence of any New Jersey Supreme Court decision construing the applicability of the challenged provisions to religiously or politically motivated speech or expressive conduct, the Court concludes that meaning of aiding and abetting discrimination under N.J.S.A. sections 10:5-12 e and n is uncertain and weighs in favor of *Pullman* abstention. *See Huqhes*, 906 F. 2d at 964.

2. *Effect of State Law on the Constitutional Claim*

As a second factor in the *Pullman* inquiry, courts should consider whether the challenged statute is "amenable to an interpretation by the state courts that would obviate the need for or substantially narrow the scope of the constitutional issues." *Chez Sez*, 945 F.2d at 632 (citations omitted). Although an administrative interpretation of a challenged provision cannot authoritatively eliminate uncertainty, an administrative interpretation that narrows or moots the federal constitutional challenge weighs in favor of abstention. *United Services Auto Ass'n*, 792 F.2d at 361 (citing *Belotti v. Baird*, 428 U.S. 132, 148 (1976)).

As Director Stewart's supplemental affidavit indicates, the challenged aid and abet provisions of the NJLAD, N.J.S.A. sections 10:5-12e and n, are subject to interpretations that would either eliminate or substantially narrow the constitutional issues presented. At a minimum, Director Stewart's supplemental affidavit shows that the two challenged NJLAD provisions can be construed as not prohibiting constitutionally protected "pure" speech. If the New Jersey Supreme Court were to adopt this interpretation, it would eliminate Reverend Cummings' claims that the NJLAD unconstitutionally prohibits him from "speaking out" against "sexual sins" and advocating discrimination against homosexuals, bisexuals, and heterosexuals engaged in sex outside of marriage. Reverend Cummings' challenge would then be

narrowed to a determination of whether expressive conduct, like publishing and distributing leaflets, can constitutionally be actionable as unlawful aiding and abetting under the NJLAD.

Under New Jersey law, courts afford the interpretation of a statute by the administrative agency charged with its enforcement special deference. *Passaic Daily News*, 63 N.J. at 484 ("placing considerable weight upon the construction of a statute . . . by the administrative agency charged by the statute with the responsibility of making it work."). The administrative agency's interpretation "is entitled to prevail, so long as it is not plainly unreasonable". *E.g., Metromedia Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 327 (1984). Therefore, there is a significant chance that given the opportunity, the New Jersey Supreme Court would adopt the narrowing constructions of N.J.S.A. sections 10:5-12e and n contained in Director Stewart's supplemental affidavit.

Even if the New Jersey Supreme Court did not adopt Director Stewart's precise interpretation, his supplemental affidavit shows that both N.J.S.A. sections 10:5-12e and n are susceptible to limiting constructions that could substantially alter, narrow, and even eliminate Reverend Cummings' First Amendment claims. The amenability of the challenged provisions to narrowing constructions weighs in favor of *Pullman* abstention. *See Hughes*, 906 F. 2d at 964.

3. *Effect of an Erroneous Federal Interpretation of State Law*

Regarding the third factor, a federal court must examine the importance of the state policies underlying the challenged statute and the potential disruption that would result from an erroneous ruling. *Hughes*, 906 F. 2d at 964.

The New Jersey Legislature, in its statement of findings, emphasized the importance of the State policies embodied in the NJLAD by declaring that discrimination based against categories of persons protected by the NJLAD "threatens not

only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." N.J.S.A. § 10:5-3.

Similarly, the New Jersey Supreme Court has stated that:

> The Law Against Discrimination, and the constitutional precepts of equal rights which it vindicates, reflect a pervasive public policy. Its objectives are constant and have a vital place throughout the panoply of state laws and actions.

*Terry v. Mercer County Board of Chosen Freeholders*, 86 N.J. 141, 151 (1981) (citations omitted).

Given the "preeminent social significance of its [the NJLAD's] purposes and objectives," an erroneous interpretation by this Court would disrupt extremely important state policies. *Passaic Daily News*, 63 N.J. at 484 (citations omitted). The importance of New Jersey's policy of eradicating "the cancer of discrimination" and the disruption that an erroneous decision by this federal court would cause weigh in favor of abstention. *Jackson v. Concord Co.*, 54 N.J. 113, 124 (1969); *see Hughes*, 906 F.2d at 964.

4. *Equitable Considerations*

Finally, as additional factors relevant to the *Pullman* abstention inquiry, courts should consider the relative weight of the first three criteria, as well as additional factors such as the availability of adequate state court remedies and the consequences of the delay caused by a decision to abstain. *See e.g. Stretton*, 944 F.2d at 140.

With respect to the three abstention criteria already discussed, the Court finds that all weigh strongly in favor of abstention. In addition, New Jersey law provides an adequate remedy whereby Reverend Cummings could obtain a declaratory ruling on his constitutional claims. New Jersey law provides that any person whose rights are affected "may have determined any question of construction or validity" arising under the challenged state law. N.J.S.A. § 2A:16-53. The

availability of declaratory relief under New Jersey law weighs in favor of abstention.

Admittedly, if this Court decided to abstain, this action, which has already been pending for over three years, would be delayed still further. According to Plaintiff, the harm to him and to other OPC members that would result from a decision to abstain, deferring a decision on the merits of this First Amendment challenge alone is sufficient to render abstention inappropriate.

Even where all three special circumstances for abstention exist, courts may refuse to abstain if the resulting delay would cause irreparable harm to the parties. *Id.* at 141; *Biegenwald*, 882 F. 2d at 753-54. Where a candidate for state judicial office mounted a challenge to the Pennsylvania Code of Judicial Conduct which prohibited him from announcing his views on disputed political or legal issues, the potential harm caused by a delayed decision on the merits rendered abstention inappropriate. *Stretton*, 944 F.2d at 141. With only a few weeks remaining before the election, a timely state court decision probably could not be obtained, leaving the plaintiff and other candidates in doubt about appropriate topics for campaign discussion. *Id.* Similarly, the disadvantages of abstaining significantly outweighed the advantages where the plaintiff, a death row inmate, might not be alive by the time the state judicial process had run its course and the litigation returned to federal court for resolution. *Biegenwald*, 882 F.2d at 753. Since the delay caused by the decision to abstain would, as a practical matter, deprive the death row inmate of any possible remedy for the alleged constitutional violations, abstention was inappropriate. *Id.* Both of these cases demonstrate that the harm caused by a delayed decision must be truly extraordinary in order to render abstention inappropriate.

Determining whether the harm to Reverend Cummings that would result from a delayed decision meets this high threshold raises unique First Amendment concerns. In the First Amendment context, the harm of a delayed decision and

therefore the appropriateness of *Pullman* abstention varies, depending upon whether the plaintiff challenges the relevant statute on its face or as applied. *Chez Sez*, 945 F.2d at 633-34. The Supreme Court has held that " 'abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression.'" *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) (quoting *Dumbrowski v. Pfister*, 380 U.S. 479, 489-90).

Distinguishing between facial and as applied challenges makes sense under the Third Circuit's two-step *Pullman* analysis. *See Chez Sez*, 945 F.2d at 633. If a statute is justifiably attacked on its face, then it is not susceptible to a limiting construction that would eliminate or alter the federal constitutional question presented, and thus the first "special circumstance" criterion for *Pullman* abstention is not met. See *Hughes*, 906 F.2d at 964. Furthermore, if the challenged statute is in fact invalid on its face, then the delay resulting from a decision to abstain would cause an extremely harmful chilling effect, a discretionary consideration that would weigh strongly in favor of immediate judicial intervention. *See. e.g. Stretton*, 944 F. 2d at 140.

In contrast, a plaintiff, by challenging a statute as applied, does not raise such concerns. "Where the state courts can, in a single proceeding, determine the bounds of the state statute by choosing between one of several alternative meanings of the statute, abstention has been held proper even where a First Amendment challenge is concerned." *Chez Sez*, 945 F.2d at 634 (citing *Babbitt v. United Farm Workers*, 442 U.S. 289, 308 (1979)). *Pullman* abstention is not inappropriate per se simply because a statute is being challenged on First Amendment grounds. *Id.*

Moreover, New Jersey law provides a specific mechanism that could substantially mitigate the harm or chilling effect for an individual awaiting a state court determination of whether a challenged statute is constitutional as applied to him. Under New Jersey law, an individual may seek a bind-

ing declaratory ruling from the appropriate administrative agency concerning the applicability of the challenged statute to specific persons or conduct. N.J.S.A. § 52:14B-8. If this Court were to abstain, Reverend Cummings could avail himself of this administrative procedure while his claims were pending in state court. By seeking a declaratory ruling from the Division, Reverend Cummings could eliminate much of the harm caused by his alleged uncertainty as to whether his religiously and politically motivated speech and expressive conduct violate the NJLAD.

Although Reverend Cummings has mounted a facial challenge to N.J.S.A. sections 10:5-12e and n, this does not end the Court's abstention inquiry. According to the Supreme Court, *Pullman* abstention is inappropriate where a plaintiff "justifiably" mounts a facial challenge to a statute. *City of Houston*, 482 U.S. at 467 (quoting *Dumbrowski*, 380 U.S. at 489-90). Therefore, this Court must assess the viability of Reverend Cummings' facial challenges to the NJLAD's two aid and abet provisions before making any final determination regarding abstention. If Reverend Cummings' facial challenges are entirely without merit, then there is an increased likelihood that *Pullman* abstention will be appropriate for his remaining claims, challenging the two provisions, N.J.S.A. sections 10:5-12e and n as they apply to him. *See Chez Sez*, 845 F.2d at 633-34.

D. *Reverend Cummings' Facial Challenge*

Reverend Cummings contends that N.J.S.A. sections 10:5-12e and n, which prohibit aiding and abetting discrimination against persons based upon affectational or sexual orientation, are unconstitutional on their face and thus should be declared invalid. According to Reverend Cummings, the challenged provisions are unconstitutional on their face for two reasons: (1) they are unconstitutionally vague and overbroad; and (2) they are content-based regulations which impermissibly discriminate against disfavored viewpoints, such as Reverend Cummings' belief that people should be dis-

criminated against based upon their sexual orientation. Both of these theories for facially invalidating the challenged aid and abet provisions lack merit.

1. *Overbreadth*

The overbreadth doctrine embodies the principle that the First Amendment "needs breathing space" and "that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be muted and perceived grievances left to fester because of the possibly inhibitory effects of overly broad statutes." *Broadrick v. Oaklahoma*, 413 U.S. 601, 611, 612 (1973).

In an existing case or controversy, the overbreadth doctrine permits "a litigant whose own activities are unprotected . . . nevertheless [to] challenge a statute by showing that it substantially abridges the rights of other parties not before the Court." *Schaumberq v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *accord Dumbrowski*, 380 U.S. at 486 (holding that overbreadth doctrine does not require "that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.").

A successful overbreadth challenge precludes enforcement of a challenged statute unless and until it is either rewritten by the legislature or authoritatively reinterpreted by a state court to remove the chilling effect upon constitutionally protected expression. *Broadrick*, 413 U.S. at 613. Consequently, "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine" that should be employed to invalidate an entire statute only where the statute's overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *id.*, and where the statute is not susceptible to a limiting construction or partial invalidation. *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)

[hereinafter *Airport Commissioners*]. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render its susceptible to an overbreadth challenge." *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) [hereinafter *Taxpayers for Vincent*].

As a guiding principle, federal courts should "never formulate a rule of constitutional law broader than is required by the precise facts to which it is applied." *United States v. Raines*, 362 U.S. 17, 21 (1961) (citations omitted). For this reason, courts should not ordinarily invalidate statutes as facially overbroad "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). In such cases, there is:

> no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.

*Id.*

Unless it appears that "any attempt to enforce" the challenged legislation "would create an unacceptable risk of the suppression of ideas," a court should declare an entire statute invalid on its face only if the record indicates that the challenged statute will have a different impact upon third parties not before the court than it has upon the plaintiffs. *Taxpayers for Vincent*, 466 U.S. at 801; *see also* Laurence H. Tribe, *American Constitutional Law*, §12-28 (2d ed. 1988) (noting the Supreme Court's increasingly unwillingness to assume the existence of a chilling effect, instead placing "a mounting burden on the individual to show that the apparent inhibition of free expression is in fact highly probable and socially significant."). Courts should not engage in overbreadth analysis where a plaintiff claims that a statute is overbroad precisely

because it applies to him. *Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989) (Higginbotham, J., concurring).

First, it is not true that "any attempt to enforce" the challenged provisions of the NJLAD "would create an unacceptable risk of the suppression of ideas." *See id.* Even if the challenged provisions of the NJLAD prohibit speech advocating discrimination, as Reverend Cummings claims, the provisions also encompass conduct that the State may legitimately prohibit. For example, the State could permissibly prohibit, for example, an individual from offering a $500 reward to employers for each time that they refuse to hire a gay or lesbian job applicant because of the applicant's sexual orientation. Such a reward scheme would have little to do with the expression of ideas and could legitimately be regulated by the state because of the secondary effects of such conduct. Therefore, Reverend Cummings cannot bring an overbreadth challenge on the ground that the two challenged provisions are not capable of constitutional application. *See id.*

Second, Reverend Cummings has failed to established that the challenged aid and abet provisions would have any different effect on third parties not before the Court than it has on himself. The Amended Complaint indicates that where its allegations refer to "Plaintiffs," this term includes not only Reverend Cummings but also OPC members. Amended Compl. ¶ 12. To the extent the Amended Complaint asserts claims by Reverend Cummings in his individual, as opposed to his official capacity as a minister, the allegedly prohibited aiding and abetting activities that he and other OPC members engage in and intend to continue are identical. In so doing, Reverend Cummings has failed to overcome the presumption that this Court should assess the constitutionality of N.J.S.A sections 10:5-12e and n as they apply to him, as opposed to on their face. This Court expresses no opinion as to whether the challenged aid and abet provisions are in fact overbroad.

Reverend Cummings has failed, however, properly to assert such a challenge.

2. *Viewpoint Discrimination*

As explained by the Supreme Court, "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't v. Mosely*, 408 U.S. 92, 96 (1972) (citation omitted). "[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion on an entire topic." *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *R.A.V. v. Citv of St. Paul*, __ U.S. __ , 112 S. Ct. 2538, 2542-48 (1992).

Applied to expressive conduct, the preference for content-neutrality permits "nonverbal expressive activity [to] be banned because of the action it entails, but not because of the ideas that it expresses." *R.A.V.*, 112 S. Ct. at 2544; *Texas v. Johnson*, 491 U.S. 397, 406 (1989). As long as the expressive conduct is not regulated because its message, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. at 2546-47.

"Content-based regulations [of speech and expressive conduct] are presumptively invalid." *R.A.V.*, 112 S. Ct. at 2542 (*citing Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)). Consequently, courts, as the first step in a First Amendment analysis, must determine whether a statute is content-neutral or content-based. *Rappa v. New Castle Countv*, 18 F.3d 1043, 1053 (3d Cir. 1994). The level of constitutional scrutiny applied to a challenged regulation depends upon this determination. If a statute is content-based, it is unconstitutional unless the State can show that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S.

37, 45 (1983); *accord Burson*, 504 U.S. at 198. In contrast, courts apply a more relaxed level of scrutiny to content-neutral restrictions, which will be upheld "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986) (citations omitted).

"Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " *Id.* at 48 (citations omitted). Where a statute is "aimed not at the content" of the restricted speech but "at the *secondary effects*" generated by or associated with the speech, the statute is content-neutral. *Renton*, 475 U.S. at 48; *see also Boos v. Barry*, 485 U.S. 312, 320 (1988). For this reason, the Supreme Court upheld a city zoning ordinance restricting the location of adult movie theaters, but not other types of theaters, as content-neutral, because the ordinance targeted the secondary effects of adult movie theaters, such as crime and diminished property values, not the content of the adult films themselves. *Id.* at 47-49. As a long as a statute "serves purposes unrelated to the content of expression," it is content-neutral, "even if it has an incidental effect upon some speakers or messages but not others." *Ward v. Rock Against*, 491 U.S. 781, 791 (1989) (citing *Renton*, 475 U.S. at 47-49).

Elaborating upon the secondary effects doctrine, the Supreme Court has indicated that "[l]isteners' reactions to speech . . . [or] [t]he emotive impact of speech upon its audience is not a secondary effect" capable of supporting a finding of content-neutrality. *R.A.V.*, 112 S. Ct. at 2549 (quoting *Boos*, 485 U.S. at 321).[3]

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[3] The Third Circuit recently questioned whether the secondary effects doctrine applies at all to political speech. *Rappa*, 18 F.3d at 1069 (noting that only a plurality of the Supreme Court approved application of the doctrine to political speech in *Boos*, 485 U.S. at 320-21).

According to Plaintiff, the NJLAD discriminates based upon both content and viewpoint. Plaintiff argues that the provisions of the NJLAD:

> impose severe disabilities upon the religious viewpoint that homosexuality, bisexuality and adultery — the protected sexual preferences — are behaviorally (as opposed to genetically) determined, and are sinful and immoral . . . while speech supporting the sexually "permissive" and "expansive" viewpoint is not similarly burdened, but actually favored and protected . . .

P1. Br. at 23. Specifically, Plaintiff maintains that the NJLAD violates the prohibitions against content and viewpoint discrimination set forth in *R.A.V.*. 112 S. Ct. 2538.

Unlike the statute at issue in *R.A.V.*, which expressly applied to symbolic speech, including burning crosses and swastikas, as well as ordinary speech such as ethnically derogatory "appellations," the challenged provisions of the NJLAD, sections 10:5-12e and n, do not expressly regulate speech. *Compare* Minn. Legis. Code § 292.02 (1990) (quoted in *R.A.V.*, 112 S. Ct. at 2541) *with* N.J.S.A. §§ 10:5-12e,n. Rather, the challenged NJLAD provisions prohibit the conduct of aiding and abetting discrimination in violation of the NJLAD. *See* N.J.S.A. §§ 10:5-12e,n. Director Stewart's supplemental affidavit construing the challenged provisions provides further support for this characterization.

Although an administrative interpretation of a challenged regulation cannot remove an ambiguity for *Pullman* purposes, courts should consider a limiting construction by an administrative agency charged with enforcement of the challenged regulation in assessing its constitutionality on its face. *Ward*, 491 U.S. at 796 (citations omitted); *Kolender v. Lawson*, 461 U.S. 352, 355 (1983) (citing *Hoffman Estates v. Flipside Hoffman Estates. Inc.*, 455 U.S. 489, 494 n.5 (1982).

As Director Stewart's interpretation makes clear, the challenged NJLAD provisions are directed primarily toward regulating discriminatory conduct and apply to speech activities only incidentally. Under Director Stewart's interpretation, the NJLAD prohibits: (1) "pure" speech that falls outside of the First Amendment's protection for a reason other than its discriminatory content; and (2) speech that is accompanied by conduct violative of the NJLAD. Stewart Supp. Aff. ¶¶ 6, 14. Specifically, Director Stewart has construed the prohibition against aiding and abetting as inapplicable to advocacy against the NJLAD and those classes of persons, including homosexuals, which the NJLAD protects. Instead, unlawful aiding and abetting "requires action which assists, supports, and supplements the action of another in conduct" that violates the NJLAD. Stewart Supp. Aff. ¶ 12.

As a result of Director Stewart's narrowing construction, the potential overlap between the challenged aid and abet provisions and speech activities is in fact quite narrow. "Pure" speech that is otherwise entitled to First Amendment protection is not subject to prosecution. Liability under the NJLAD attaches only speech that is "'directed to inciting or producing imminent lawless action and is likely to produce such action,'" which is not entitled to First Amendment protection. Stewart Supp. Aff. ¶ 14 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). As Justice Scalia noted in *R.A.V.*,

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.

*R.A.V.*, 112 S. Ct. at 2546 (citations omitted). As an example, Justice Scalia indicated that "sexually derogatory 'fighting

words,' among other words, may produce a violation of Title VII's general prohibition against discrimination in employment practices." Therefore, as long as section 10:5-12e permissibly regulates conduct or secondary effects, rather than expression, New Jersey may impose liability for content-based subcategory of constitutionally unprotected incitement to unlawfully discriminate against persons based upon their affectational or sexual orientation.

Dissemination of ideas committed to writing involves both speech and conduct. While Director Stewart's supplemental affidavit indicates that Reverend Cummings and others will not be prosecuted because of the ideas expressed in written materials, as this Court indicated in its discussion of ripeness, section II.B.1, *supra*, the State's interpretation does not waive prosecution for the conduct component of this speech activity, the printing and distribution of written materials. Printing and distribution activities apparently qualify as unlawful aiding and abetting under the NJLAD as construed by Director Stewart. *See* Stewart Supp. Aff. ¶ 12. This Court must now assess whether the challenged NJLAD provisions impermissibly regulate this conduct based upon the message conveyed. *See R.A.V.*, 112 S. Ct. at 2544.

In two recent opinions, the Supreme Court, in dicta, has characterized Title VII, which prohibits discrimination in employment based upon "'race, color, religion, sex, or national origin' . . . an example of a permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2200 (1993) (quoting 42 U.S.C. § 2000e-2(a) (1) ); *R.A.V.*, 112 S. Ct. at 2546. Without providing any analysis, the Supreme Court made this characterization, while acknowledging that Title VII may be violated by words that create a hostile work environment. *Id* . In fact, Justice Scalia cited Title VII as an example of a content-neutral regulation of the "secondary effects" of speech, justified without reference to

the message of the speech or expressive conduct. *Id.* at 2546-47 (citing *Renton*, 475 U.S. at 48).[4]

Similarly, the Second Circuit Court of Appeals recently upheld a New York statute prohibiting aiding and abetting discrimination in access to public accommodations as a per-

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[4] Among academics, the Supreme Court's characterization of Title VII as content-neutral regulation of conduct or "secondary effects" has received substantial criticism and discussion. *E.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO STATE L.J. 481 (1991); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. REV. 1791 (1992); Suzanne Sangree, *Title VII Prohitions Against Hostile Environment Sexual Harassment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995). Applied in the context of Title VII, secondary effects analysis suggests that governments may target discriminatory conduct because it excludes women and minorities from the workplace and thus denies them equal employment opportunities. This discriminatory conduct should not be insulated simply because it is achieved through spoken words. *See id.* ("acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."). An employer, for example, who verbally rejects a job applicant because of her gender is not immune from liability under Title VII.

In at least some circumstances, however, antidiscrimination statutes are in tension with the secondary effects doctrine. According to the Supreme Court, secondary effects that may legitimately be regulated by the State do not include "[l]isteners' reactions to speech . . . [or] [t]he emotive impact of speech upon its audience." *R.A.V.*, 112 S. Ct. at 2549 (quoting *Boos*, 485 U.S. at 321); yet the secondary effect that the government seeks to regulate through prohibiting discriminatory "conduct" frequently depend upon the anticipated response of the person discriminated against. If sexually derogatory remarks, to take Justice Scalia's example, did not have a damaging effect upon many women who hear them, there would be no need for such statements to be actionable under Title VII as discriminatory "conduct" creating a hostile work environment. Similarly, New Jersey need not prohibit employers from distributing advertisements or statements suggesting that employment opportunities are limited for persons possessing traits protected by the NJLAD if those statements were not likely to have the impact of discouraging protected persons from applying for jobs. *See* N.J.S.A. § 10:5-12c.

missible regulation of conduct that only incidentally infringed upon the First Amendment rights of a religious group. *Jews for Jesus Inc. v. Jewish Community Relations Council of New York*, 968 F.2d 286, 295 (2d Cir. 1992) (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) [*hereinafter Jewish Community Relations Council*] (holding that Jewish organization that had allegedly economically coerced resort into cancelling its contract with Jews for Jesus organization could not evade liability on grounds that conduct was protected by First Amendment).

Consequently, the Second Circuit applied the *O'Brien* test, under which a statute will be upheld:

> "if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction of First Amendment freedoms is no greater than is essential to the furtherance of that interest."

*Jewish Community Relations Council*, 968 F.2d at 295 (quoting *O'Brien*, 391 U.S. at 377).

While recognizing these tensions inherent in characterizing antidiscrimination laws as regulation of conduct or secondary effects, this Court concludes that only an strict scrutiny is not required to assess the constitutionality of the challenged NJLAD provisions. *See Wisconsin v. Mitchell*, 113 S. Ct. at 2200 (1993); *R.A.V.*, 112 S. Ct. at 2546. *See also Roberts v. Jaycees*, 468 U.S. 609, 628 (1984); *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (upholding antidiscrimination statutes against challenges that they unconstitutionally suppressed the message conveyed by refusing to associate with women or African-Americans). Rather, an intermediate level of scrutiny applies.

In fact, the tests established by the Supreme Court in *Renton* for permissible regulation of secondary effects test and *O'Brien* for expressive conduct are substantially similar. *Compare Renton*, 475 U.S. at 47, *with O'Brien*, 391 U.S. at 377. Content-neutral regulations of secondary effects withstand constitutional scrutiny "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47 (citations omitted). If a regulation places greater restrictions on First Amendment freedoms "than is essential to the furtherance of that [government] interest," in violation of *O'Brien*, 391 U.S at 377, then the regulation also "unreasonably limit[s] alternative avenues of communication." *Renton*, 475 U.S. at 47 (citations omitted).

As this Court indicated in the discussion of *Pullman* abstention, section II.C.3, *supra*, New Jersey has described its interest in eliminating discrimination on the basis of race, creed, sexual orientation, and gender, among other characteristics, as being of "preeminent social significance." *Passaic Daily News*, 63 N.J. at 484 (citations omitted); see also N.J.S.A. § 10:5-3 (Legislature's statement of findings). New Jersey's interest is not only substantial but also can be characterized as compelling. Section 10:5-12e, which generally prohibits aiding and abetting discrimination in violation of the NJLAD, thus furthers this substantial State interest. *See Renton*, 475 U.S. at 47 (citations omitted).

New Jersey's "interest in prohibiting such discrimination in these situations [employment, public accommodations, and business transactions] is not directed at or related to suppressing expression." *Jewish Community Relations Council*, 968 F.2d at 295. As the Second Circuit noted in *Jewish Committee for Human Relations*,

> [i]f discrimination engaged in by "primary" actors using words can be constitutionally outlawed, *see R.A.V.*, 112 S. Ct. at 2547, so too can discrimination engaged in by third parties who use speech or other

> expressive conduct to coerce [or aid and abet] a "primary" actor to violate an antidiscrimination statute.

968 F.2d at 296. A statute regulating conduct or secondary effects is not unconstitutional simply because speech or expressive conduct may occasionally provide the vehicle for committing a violation. *Id.* at 295 (citing *R.A.V.*, 112 S. Ct at 2546). Expressive conduct is "not shielded from regulation merely because [it] expresses a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. at 2546.

Furthermore, the NJLAD does not prohibit all speech or written materials containing discriminatory statements. Rather, the challenged aid and abet provisions incidentally restrict speech activities in extremely limited circumstances. As interpreted by Director Stewart, the only speech activities that the challenged aid and abet provisions apply to are printing and distribution of written materials. Moreover, printing and distribution are not incidentally restricted in all circumstances, but only where it they are likely to have discriminatory secondary effects of discrimination in employment, public accommodations, business or real estate transactions. *See* N.J.S.A. §§ 10:5-12c,f,g,h. Therefore, the challenged aid and abet provisions of the NJLAD, sections 10:5-12e and n, do not unreasonably limit Reverend Cummings and other OPC members' ability to express and to disseminate their belief that homosexuality, bisexuality, and sex outside of marriage are wrong. *See Renton*, 475 U.S. at 47 (citations omitted).

While this analysis disposes of Reverend Cummings' challenge to the general aid and abet provision, section 10:5-12e, this Court must address one final objection that relates solely to section 10:5-12n, which prohibits aiding and abetting in the specific context of business and credit transactions.

Section 10:5-12n, the aid and abet provision, and the NJLAD sections that prohibit primary discrimination in business and credit transactions, sections 10:5-121 and m, contain

explicit exceptions. All three provisions exempt discriminatory refusals to do business and aiding and abetting such refusals "pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or made or taken in connection with a protest of unlawful discrimination or unlawful employment practices." N.J.S.A. § 10:5-12n(2); see also N.J.S.A. §§ 10:5-121, m.

According to Reverend Cummings, section 10:5-12n, these exceptions to the general ban against discrimination in business and credit transactions are content-based and therefore violate the First Amendment. The statutory language itself does not fully support Reverend Cummings' claim of content-based discrimination. Sections 10:5-12n, l and m permit aiding and abetting discrimination in business transactions "pertaining to" or "made in connection with" a labor dispute. This language could just as easily apply to the context in which expressive conduct constituting aiding and abetting discrimination occurs, as to the message of that conduct.

Arguing that section 10:5-12n is unconstitutional, Reverend Cummings relies upon cases that invalidated ordinances prohibiting all picketing within a public forum except for pickets related to labor disputes. *Mosely*, 408 U.S. at 99; *Carey v. Brown*, 447 U.S. 455, 471 (1980). *See also Rappa*, 18 F.3d at 1063 ("When the government creates content-based exemptions from a general ban, it implies that it does not have as great an interest in limiting speech as the general ban suggests."); *Cincinnati v. Discoverv Network*, __ U.S. __ , 113 S. Ct. 1505 (1993). To survive constitutional challenge a content-based restriction on speech in a public form must survive strict scrutiny. *E.g.. Carey*, 447 U.S. at 465 (requiring a compelling state interest and no adequate content-neutral alternatives).

In contrast, the NJLAD does not target expression, but conduct or secondary effects. As a result, the NJLAD is subject a lower level of constitutional scrutiny than the picketing

regulations at issue in *Mosely* and *Carey*. In regulating conduct and secondary effects legislatures frequently draw distinctions. In making such distinctions, legislatures must comply with the Equal Protection clause of the Fourteenth Amendment. Where a statute targets conduct or secondary effects, these distinctions need only be rationally drawn in order to withstand constitutional scrutiny. *See Renton*, 475 U.S. at 53(citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955) (rejecting claim that city ordinance regulating adult movie theaters was invalid because it did not target other adult businesses presumably generating the same secondary effects)). *See also Mitchell*, 113 S. Ct. at 2200 (" 'it is but *reasonable* that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.' " (quoting 4 W. Blackstone, *Commentaries* *16)).

Reverend Cummings's bases his equal protection challenge to section 10:5-12n upon the mistaken premise that the provision was subject to strict scrutiny and that any content-based exceptions were presumptively invalid. Throughout this litigation, Reverend Cummings has never called the legitimacy of the distinctions drawn by section 10:5-12n into question. Neither party addressed this issue in its briefs. As a result, a rational basis challenge to the provision prohibiting aiding and abetting discrimination in business transactions is not before the Court and cannot provide a basis for invalidation.

3. *Summary of Conclusions*

Reverend Cummings advocated two theories in support of his facial challenges to sections 10:5-12e and n: (1) overbreadth; and (2) content or viewpoint-based discrimination. This Court has concludes that both theories for facially invalidating the challenged NJLAD provisions lack merit. Therefore, Reverend Cummings' motion for summary judgment requesting this Court to declare each provision, sections 10:5-12e and n, facially unconstitutional is **denied**. Accord-

ingly, the Defendants' motion to dismiss Reverend Cummings' claims of facial invalidity on their merits is **granted**.

E. *Reverend Cumminas' "As Applied" Challenge*

Having concluded that Reverend Cummings' facial challenges to the two statutory provisions lack merit, this Court must revisit the issue of Pullman abstention. *See City of Houston*, 482 U.S. at 467 (quoting *Dumbrowski,* 380 U.S. at 489-90) (indicating that *Pullman* abstention is inappropriate where a plaintiff "justifiably" mounts a facial challenge to a statute).

As this Court indicated in its discussion of *Pullman* abstention, section II.C *supra*, all other relevant factors: the uncertainty of New Jersey law on the challenges aiding and abetting as applied to religiously or politically motivated speech; the ability of a state court decision to narrow the federal constitutional issues presented; and the important state interests that are at stake, this Court exercises its discretion to abstain from deciding the merits of Reverend Cummings claim that sections 10:5-12e and n are unconstitutional as applied to him and other OPC members. *See Hughes*, 906 F.2d at 964.

Defendants mistakenly contend that *Pullman* abstention results in dismissal of Reverend Cummings' claims. By abstaining under *Pullman*, a federal court does not abdicate jurisdiction but merely postpones its exercise. *Harrison*, 360 U.S. at 177 (1959) (citations omitted). As a result, this Court **retains** jurisdiction over Reverend Cummings' as applied challenge to sections 10:5-12e and n pending an adjudication by the New Jersey courts. Unless and until such an adjudication is made, this action shall be **administratively terminated**.

III. CONCLUSION

Since the Defendants' failed to file an appropriate pleading, this Court must **deny** Defendants' request for a declaratory judgment stating that Director Stewart's original and

supplemental affidavits represent New Jersey's official interpretation of the NJLAD, as amended in 1992 to protect persons from discrimination based upon affectational or sexual orientation.

With respect to Reverend Cummings, his motion for summary judgment is **denied**. Defendants' motion to dismiss is **granted in part and denied in part**. Reverend Cummings' challenges to sections 10:5-12c,f,1 and m are **dismissed** as having been previously abandoned in this litigation. His challenge to the notice posting provision, section 10:5-12j is **dismissed**, without prejudice, as unripe for adjudication. In addition, his facial challenges to sections 10:5-12e and n are **dismissed** on the merits. Finally, this Court **shall abstain** from adjudicating the merits of Reverend Cummings' challenges to 10:5-12e and n as they apply to him and other OPC members but **retains jurisdiction** over these claims pending a state court adjudication.

Dated: September 13, 1995

/s/
WILLIAM G. BASSLER,
U.S.D.J.

# UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF NEW JERSEY

Civ. No. 92-1641 (WGB)

JUDGMENT ORDER

THE PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, and REV. DAVID B. CUMMINGS,

*Plaintiffs,*

v.

JAMES FLORIO, ROBERT DEL TUFO, MARILYN FLANZBAUM, ROMAN ANGEL, BETTY CARSON, OLGA L. VASQUEZ-CLOUGH, FELTON LINGO, SR., REINHOLD W. SMYCZEK, CASEY TAM, C. GREGORY STEWART, JOHN DOE(S), and JANE DOE(S),

*Defendants.*

FILED: SEP 13 1995 at 8:30
William T. Walsh, Clerk

This matter having come before the Court on Defendants' motion to dismiss and for a declaratory judgment, and Plaintiff, Reverand Cummings' motion for summary judgment declaring certain provisions of New Jersey's Law Against Discrimination, N.J.S.A. § 10:5-1 *et seq.*, unconstitutional under the First Amendment to the United States Constitution; and

The Court having considered the submissions of counsel on behalf of the parties; and

For the reasons set forth in the Court's Opinion filed this day; and

For good cause shown;

It is on this 13th day of September, 1995 ORDERED as follows:

1. Defendants' request for a declaratory judgment stating that Director Stewart's original and supplemental affidavits represent New Jersey's official interpretation of the NJAD, as amended, is **denied;**

2. Reverend Cummings' motion for summary judgment is **denied.**

3 Defendants' motion to dismiss is **granted in part and denied in part:**

a. Reverend Cummings' challenges to sections 10:5-12c,f,1 and m are **dismissed** as having been previously abandoned in this litigation;

b. Reverend Cummings' challenge to the notice posting provision, section 10: 5-12j is **dismissed**, without prejudice, as unripe for adjudication;

c. Reverend Cummings' facial challenges to sections 10:5-12e and n, are dismissed on the merits; and

d. This Court shall abstain from adjudicating the merits of Reverend Cummings' challenges to 10:5-12e and n as they apply to him and other members of the Orthodox Presbyterian Church. The Court shall retain jurisdiction over these claims pending a state court adjudication. In the interim, the Clerk of the Court **shall administratively terminate** this action unless and until Plaintiff petitions to have it reopened.

/s/_____
WILLIAM G. BASSLER,
U.S.D.J.

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 93-5559

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THE PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation; CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey corporation; REV. DAVID B. CUMMINGS

*Appellants*

v.

JAMES FLORIO, GOVERNOR OF NEW JERSEY, in his official capacity; ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY, in his official capacity; MARILYN FLANZBAUM; ROMAN ANGEL; BETTY CARSON; OLGA L. VAZQUEZ-CLOUGH; FELTON LINGO, SR.; REINHOLD W. SMYCZEK; CASEY TAM, all in their official capacities as members of THE DIVISION ON CIVIL RIGHTS; C. GREGORY STEWART, in his official capacity as executive of THE DIVISION ON CIVIL RIGHTS; JOHN DOE(S); JANE DOE(S), addresses unknown, the last two being fictitious names, the real names of said defendants being presently unknown or known only in part to plaintiffs, said fictitious names being intended to designate organizations, persons and others acting in concert with any of the defendants who engage in, are engaged in, or who intend to engage in, the conduct of defendants complained of herein, or who would have the right to file or seek enforcement of administrative, equitable or legal complaints or suits or to assert any other legal claims or remedies or enforcement thereof against the plaintiffs under the New Jersey Law Against Discrimination, as amended by the 1992 affectional and sexual orientation amendments, and all others similarly situated,

*Appellees*

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (D.C. CIVIL ACTION NO. 92-CV-01641)**

Argued: March 25, 1994

PRESENT: HUTCHINSON, ROTH and ROSENN, *Circuit Judges*

(Filed November 16, 1994)

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## OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Appellants, the Presbytery of New Jersey of the Orthodox Presbyterian Church ("Presbytery"), the Calvary Orthodox Presbyterian Church of Wildwood ("Calvary") and Reverend David B. Cummings ("Cummings"), a clergyman of the Orthodox Presbyterian denomination (collectively "plaintiffs"), appeal an order of the district court dismissing their complaint.[1] Plaintiffs assert recent amendments to the New Jersey Law Against Discrimination (the "LAD" or "Act"), N.J. Stat. Ann. §§ 10:5-1 to 10:5-42 (West 1993 & Supp. 1994), violate the First Amendment right to freedom of speech. The amendments they question added to the category of impermissible distinctions "affectional or sexual orientation" to the statute's ban on certain forms of discrimination. Relying on a responsible state official's affidavit that the state would not enforce the LAD against Calvary or Presbytery as churches or Cummings as a church pastor, the district court held that the case was not ripe.

We conclude, however, that the controversy is ripe because Cummings arguably alleges the statute threatens his right as an individual citizen to speak out against male and female homosexual acts and the state has expressly refused to offer any assurance it will not prosecute Cummings if he does so outside his church. The same, however, is not true of the institutional church plaintiffs, Presbytery and Calvary. Ac-

[1] The caption in this case lists James Florio as the Governor of New Jersey. After it was filed, Christine Todd Whitman was elected to that office, but there has not yet been a substitution of parties. The failure to amend the caption in this respect does not affect this appeal. *See* Fed. R. Civ. P. 25(d)(1). We note the change for purposes of clarification only.

cordingly, we will reverse the district court's order and remand for further proceedings consistent with this opinion in so far as its order applies to Reverend Cummings. We will, however affirm the district court's dismissal without prejudice of this action as it pertains to the institutional plaintiffs.

## I.

In April 1992, the plaintiffs brought this suit to enjoin enforcement of recent amendments to the LAD which had added "affectional or sexual orientation" to the personal traits or characteristics generally protected against discrimination in public accommodations,[2] employment and housing. *See* N.J. Stat. Ann. § 10:5-4, 10:5-12 (West Supp. 1994). The statute also prohibits "aid[ing], abet[ting], incit[ing], compel[ing] or coerc[ing]" others into violations of its prohibitions against discrimination. N.J. Stat. Ann. § 10:5-12(e); *see* N.J. Stat. Ann. § 10:5-12(n). The plaintiffs originally challenged these and other provisions as an infringement on the First Amendment right to the free exercise of religion and association as well as the right to freedom of speech. On May 15, 1992, they filed a motion for a preliminary injunction and on May 22, filed an amended complaint. On June 11, 1992, the state filed a motion for summary judgment along with a motion for dismissal. The district court heard oral argument but denied the motion for a preliminary injunction holding that the plaintiffs failed to establish both a likelihood of success on the merits and irreparable harm. The plaintiffs appealed to this Court and on December 14, 1992, we affirmed the district court in an unpublished memorandum opinion. *Presbytery of New Jersey v. Florio*, No. 92-5339, slip. op. at 13 (3d Cir. Dec. 14, 1992) ("*Presbytery I*"), *see* 983 F.2d 1052 (3d Cir.

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[2] Public accommodations are defined quite broadly in N.J. Stat. Ann. § 10:5-5(l). They include, but are not limited to, taverns, hotels, trailer camps, day camps, health facilities, stores and other retail establishments, restaurants, public conveyances, movie theaters, pool halls, schools, etc. *See id.*

1992) (Table). Because of the state's affidavit stating its intention not to enforce the Act against religious institutions, we held that the plaintiffs failed to demonstrate the possibility of immediate and irreparable harm. *Id.* at 9-10. We also held that the possibility of private enforcement of the Act by activist homosexual groups was too remote to constitute an immediate threat of potential harm and, in any event, the private parties would not be bound by the injunction sought. *Id.* at 10-12. We specifically refused to comment on the district court's discussion of the plaintiffs' likelihood of success on the merits. *Id.* at 13.

Following our decision, the district court heard argument on the state's Rule 12(b)(1) motion to dismiss. The state argued that the plaintiffs lacked standing, the case was not ripe and that the federal court should abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). The district court granted the state's motion and dismissed the complaint. *Presbytery of New Jersey v. Florio*, 830 F. Supp. 241 (D.N.J. 1993) ("*Presbytery II*"). It held that the case was not ripe, based on the state's affidavit that it would not enforce the Act against the institutional plaintiffs as churches or Cummings in his capacity as a clergyman of the Orthodox Presbyterian Church. *Id.* at 248-50.[3] The plaintiffs filed a timely notice of appeal.

## II.

The LAD, originally enacted in 1945, prohibits discrimination in employment, labor organization membership, public accommodations and real estate, financial, and business transactions. In 1991, the New Jersey legislature added "affectional or sexual orientation" to the personal characteristics of race, creed, color, national origin, ancestry, age, sex, and marital status previously protected.[4] Under the Act, it is

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[3] The court did not reach the issue of standing or *Pullman* abstention.

[4] The legislature's finding and declaration states:

unlawful for an employer "to refuse to hire or employ or to bar or to discharge or require to retire" any individual on the basis of a protected characteristic. *Id.* § 10:5-12(a). The Act also prohibits the printing or circulating of any statement which expresses, directly or indirectly, that employment opportunities for persons with the protected characteristics will be limited. *Id.* § 10:5-12(c). Public accommodations are similarly restrained. *See id.* § 10:5-12(f). In addition, the LAD makes it illegal for any individual to refuse to transact business with individual groups who have any of the protected characteristics. *Id.* § 10:5-12(l), (m). The Act also makes it illegal "to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." *Id.* § 10:5-12(e). Still another section applying the Act's prohibition against aiding, abetting, inciting or coercing violations of subsection (l) and (m) specifically prohibits incitements to boycott persons who belong to the protected groups. *Id.* § 10:5-12(n)(2). Finally, the Act requires owners of public accommodations and employers to post public notices informing employees and patrons of their rights under the Act. *Id.* § 10:5-12(j).

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> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of . . . affectional or sexual orientation . . . [is a] matter[] of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State . . . .
>
> . . .
>
> The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. . . . The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

N.J. Stat. Ann. § 10:5-3 (West Supp. 1994).

The Act exempts religious organizations from compliance in the selection of their own employees and it permits religious organizations to restrict rental or use of their own property to members of their own faith. *Id.* § 10:5-12(a), 10:5-5(n). The Act does not apply to private clubs or facilities for religious education. *Id.* § 10:5-5(l).

The state itself may enforce the Act's civil penalties against violators. An aggrieved individual may begin the process of civil enforcement by filing a complaint with the state Division on Civil Rights ("DCR") or proceeding directly to state court. *Id.* § 10:5-13 (West 1993). The Act specifically grants standing to sue to "[a]ny individual who has been discriminated against" and 'any organization which represents or acts to further the interests of individuals who have been discriminated against." *Id.* § 10:5-38 (West 1993). The successful plaintiff may recover compensatory and punitive damages, fines, and attorney fees. *Id.* § 10:5-3; *id.* § 10:5-14.1a (West 1993); *id.* § 10:5-27.1 (West 1993). The Act is to be liberally construed to accomplish its purpose of eradicating the kinds of discrimination it prohibits. *See id.* § 10:5-3.

The Orthodox Presbyterian Church ("OPC") is a national denomination with 170 member churches, including Calvary. The OPC split from the Presbyterian Church (U.S.A.) in 1936 over a doctrinal difference.[5] Presbytery is a New Jersey religious corporation and the formal governing body of OPC churches in New Jersey. At the time plaintiffs initially filed their complaint, the OPC had 2,113 members in New Jersey.

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[5] The Presbyterian Church (U.S.A.) as well as a number of other mainstream organized religions have filed a joint amicus brief setting out their opposition to OPC's doctrinal views and teachings. These amici support the state's position on the merits of this case. Because we are only concerned with jurisdiction on this appeal we do not decide the merits.

In their complaint, the plaintiffs allege the following. Based upon *The Holy Bible* and church doctrine, the OPC teaches that homosexuality, bisexuality, and heterosexual sex outside of marriage are grievous sins. Plaintiffs also allege that they

> have always in the past, presently do and since the 1992 amendments, have directly or indirectly discriminated against and made reasonable distinctions based upon homosexuality, bisexuality and heterosexual sex outside of marriage. For example, in New Jersey the plaintiffs express, speak and preach against homosexuality, adultery and fornication, calling it variously an abomination and sinful. . . . They also disseminate and circulate such speech and distinctions throughout New Jersey and the world. . . . [T]hey even print and disseminate materials condemning sexual sins. . . . Plaintiffs, and their members, also inquire about the sexual practices of prospective employees and are continuing to do so despite the existence of the 1992 amendments.

Complaint § 49, Appellants' Appendix ("App.") at 217. Cummings and members of his congregation "speak out about homosexuality, bisexuality and heterosexual sex outside of marriage, make reasonable distinctions based on such practices, lobby against them, and circulate literature condemning them. They encourage, aid and abet discrimination and reasonable distinctions against homosexuals, bisexuals and heterosexuals engaging in sex outside of marriage." *Id.* ¶ 51, App. at 217-18. Furthermore, "[p]laintiffs have always in the past, presently do and since the amendments have refused to knowingly buy from, contract with or otherwise do business with persons on the basis of that person's homosexual, bisexual or heterosexual practices." *Id.* ¶ 57, App. at 220. Plaintiffs also "have always in the past, presently do and since the amendments have refused to employ any individual who is

practicing any public sexual sin, including fornication, adultery and homosexuality, and they make reasonable distinctions based on such acts." *Id.* ¶ 69, App. at 223.

Initially, plaintiffs contended that various elements of the Act violated their First, Fifth, Ninth and Fourteenth Amendment rights. The allegedly offending sections included: sections 10:5-12(a) and (c) (applicable to employers); section 10:5-12(f) (applicable to public accommodations); sections 10:5-12(e) and (n) (prohibition against aiding, abetting, or inciting violations); section 10:5-12(j) (notice posting provision); and sections 10:5-12(l) and (m) (prohibition of boycotts and refusal to do business).

In response to plaintiffs' initial request for a preliminary injunction, the Director of the DCR, C. Gregory Stewart, filed an affidavit setting forth the DCR's and attorney general's position on enforcement of the Act against religious institutions. The Stewart affidavit averred that the state did not consider churches places of "public accommodations." Thus, the sections relating to public accommodations were inapplicable to the institutional plaintiffs. Stewart further stated that churches were considered exempt in their hiring of internal employees. Due to "First Amendment concerns,"

> the Division has not in the past prosecuted and has no intention to prosecute [under sections 10:5-12(c), (e), (f), (j), (l) & (m)] essentially exempt churches for sincerely-held religious belief or practice, or speech consistent with such belief, or for a refusal to engage in certain speech or for following their religious tenets . . . . Hence, the Division would not even attempt to enforce those provisions in the circumstances of sincerely-held religious reasons such as plaintiffs express here. . . .

App. at 296. Stewart also made the following general statement:

> [I]t has been the consistent construction and interpretation of the LAD that, consonant with constitutional legal barriers respecting legitimate belief and free exercise protected by the First Amendment, the State was not authorized to regulate or control religious worship, beliefs, governance, practice or liturgical norms, even where ostensibly or colorably at odds with any of the LAD prohibited categories of discrimination.
>
> . . .
>
> Moreover, the Division has not and has no intention to engage in any determination or judgment as to what is or is not a "religious activity" of a church, or to determine what is or is not a "tenet" of religious faith. Within First Amendment limits, all of plaintiffs' claimed religiously-based free exercises of faith are unthreatened by a reasoned construction of the LAD consistent with its meaning and long enforcement history.

App. at 294-96. The affidavit did not, however, disavow enforcement against the members of the church for their public activities nor does it preclude enforcement against Cummings for his activities outside the Church.

In light of the Stewart affidavit and our prior decision in *Presbytery I*, the parties agree that the scope of their challenge on the merits to the Act has been significantly limited. The plaintiffs now challenge only section 10:5-12(e), which makes it illegal "to aid, abet, incite, compel or coerce" forbidden acts, section 10:5-12(n), which makes it illegal "to aid, abet, incite, compel, coerce or induce" boycotts or refusals to do business and section 10:5-12(j), the notice posting provision. *Presbytery II*, 830 F. Supp. at 247; Brief of Appellants at 6. Plaintiffs argue that the first two sections are impermissible restrictions on freedom of speech and the last provision is a violation of the freedom of conscience and forced speech.

Before the district court, however, the plaintiffs conceded that in light of the representations of the DCR, the sections have no applicability to the institutional plaintiffs Presbytery and Calvary. *Id.*

## III.

If this case is ripe, and if any of the plaintiffs have standing to assert their free speech claim, the district court would have subject matter jurisdiction under 28 U.S.C.A. § 1331, 1343 (West 1993) and 28 U.S.C.A. § 2201, 2202 (West 1994). The state contends, however, that the district court lacked jurisdiction because the plaintiffs did not present an Article III justiciable controversy. The district court agreed and dismissed the case on this ground. Because the district court did not reach the merits of the plaintiffs' claim, the dismissal was without prejudice.[6] The district court's order is, however, a final resolution of the plaintiffs' claims and therefore we have appellate jurisdiction pursuant to 28 U.S.C.A. § 1291 (West 1993).

Our review of ripeness and standing determinations is plenary. *Taylor Inv. Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1289 (3d Cir.), *cert. denied*, 114 S. Ct. 304 (1993); *Roe v. Operation Rescue*, 919 F.2d 857, 863 (3d Cir. 1990).

## IV.

The issue on this appeal is whether the plaintiffs have presented a ripe controversy so that an Article III court may assert jurisdiction. We examine the merits of the claim only

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[6] Generally, when a district court dismisses a case without prejudice, it is not a final order unless the party seeking appeal has specifically elected to stand on the complaint as set forth. *See generally Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976) (per curiam). In a case such as this where the district court has dismissed based on justiciability and it appears that the plaintiffs could do nothing to cure their complaint, the principle of *Borelli* does not apply. *Cf. Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877, 878 n.4 (3d Cir. 1987) (dismissal without prejudice does not destroy finality where party cannot cure defect).

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to the extent necessary to determine whether there is any potential for immediacy of harm.

Federal courts may only resolve actual "cases" and "controversies." *See* U.S. Const. art. III, § 2. The existence of a case and controversy is a prerequisite to all federal actions, including those for declaratory or injunctive relief. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1974 (1993); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. We presume that federal courts lack jurisdiction 'unless "the contrary appears affirmatively from the record." ' " *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) (quoting *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887))).

The concepts of standing and ripeness are related. Each is a component of the Constitution's limitation of the judicial power to real cases and controversies. Correct analysis in terms of ripeness tells us when a proper party may bring an action and analysis in terms of standing tells us who may bring the action. *See Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 & nn. 12-13 (3d Cir. 1992); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 99 (1989) ("standing focuses on whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet"). Because these concepts are so closely related, they can be confused or conflated. "It is sometimes argued that standing is about *who* can sue while ripeness is about *when* they can sue, though it is of course true that if no injury has occurred, the plaintiff can be told either that *she* cannot sue, or that she cannot sue *yet*." *Smith v. Wisconsin Dep't of Agriculture, Trade & Consumer Protection*, 23 F.3d 1134, 1141 (7th Cir. 1994) (emphasis in original). It is the plaintiff's responsibility to

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allege facts that invoke the court's jurisdiction. *Renne*, 501 U.S. at 316.

The district court did not reach the issue of standing but focused on whether any of the plaintiffs presented a ripe controversy.[7] Ripeness prevents courts from "entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). "[R]uling on federal constitutional matters in advance of the necessity of deciding them [is to be avoided], to postpone judicial review where it would be premature." *Armstrong*, 961 F.2d at 413. The ripeness determination "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. Ultimately, the case must involve "'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quotation omitted). "A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citation omitted).

As Professor Chemerinsky recognizes, "[r]ipeness properly should be understood as involving the question of *when may a party seek preenforcement review of a statute or regulation*." Chemerinsky, *supra*, at 100 (emphasis in original). Thus, it is not surprising that the ripeness inquiry often in-

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[7] The district court did opine, however, that "even if the Church's members were parties, nothing in the record indicates any realistic threat that the state will enforce the amendments against them." *Presbytery II*, 830 F. Supp. at 249. That conclusion is open to doubt considering the state's refusal to negate in its affidavit an intention to enforce the statute against members of the Orthodox Presbyterian denomination in their secular activities.

volves declaratory actions which present special problems. *See Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 273 (1941) ("Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.").

We have adopted a three part test in determining whether we will engage in preenforcement review in the context of a declaratory action; specifically, we examine "the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990); *see also Armstrong*, 961 F.2d. at 412-24 (applying test while noting that factors are not exclusive).

On the first part, adversity of interest, we have observed, "'[f]or there to be an actual controversy[,] the defendant must be so situated that the parties have adverse legal interests.'" *Step-Saver*, 912 F.2d at 648 (quoting 10A Charles Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure* § 2757, at 582-83 (2d ed. 1983)). Although the party seeking review need not have suffered a "completed harm" to establish adversity of interest, *Armstrong*, 961 F.2d at 412, it is necessary that there be a substantial threat of real harm and that the threat "must remain 'real and immediate' throughout the course of the litigation." *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 192 (3d Cir. 1990). Thus, where intervening events remove the possibility of harm, "the court must not address the now-speculative controversy." *Id.*; *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (threatened injury must be "certainly impending").

Second, the parties must not only retain adverse interests throughout the litigation, but "[a]ny contest must be based on a 'real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished

from an opinion advising what the law would be upon a hypothetical state of facts.'" *Step-Saver*, 912 F.2d at 649 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). "A declaratory judgment granted in the absence of a concrete set of facts would itself be a 'contingency,' and applying it to actual controversies which subsequently arise would be an 'exercise in futility.'" *Armstrong*, 961 F.2d at 412 (quoting *Step-Saver*, 912 F.2d at 648). The requirement of concreteness has some play in the joints. We have noted, "the need for a concrete set of facts is greater in some instances than others." *Id.* For example, an "actual factual setting" is "particularly important in cases raising allegations of an unconstitutional taking," *id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981)), whereas facts are not so important where the question is "predominantly legal." *Id.* (quoting *Pacific Gas & Elec. Co.*, 461 U.S. at 201).

The third part of the test, utility of the judgment, is important because "[o]ne of the primary purposes behind the Declaratory Judgment Act was to enable plaintiffs to preserve the status quo . . ., and a case should not be considered justiciable unless 'the court is convinced that [by its action] a useful purpose will be served.'" *Step-Saver*, 912 F.2d at 649 (quoting E. Borchard, *Declaratory Judgments* 29, 58 (1941)). Thus, with these three inquiries in mind, we turn to an analysis of whether the district court erred by determining this case did not present a ripe controversy.

1. Adversity of interest

In *Armstrong* we said, "[w]here the plaintiff's action is based on a contingency, it is unlikely that the parties' interest will be sufficiently adverse to give rise to a case or controversy within the meaning of Article III." *Armstrong*, 961 F.2d at 411-12. In concluding that the instant case was not ripe for adjudication, the district court relied in large part on the representations of the DCR through the Stewart affidavit and a history of the LAD's non-enforcement against religiously motivated speakers. Thus, in terms of the *Step-Saver* test, the district court determined that the parties had no adverse interest. Despite Cummings' assertion that he has engaged, does engage and will engage in prohibited discrimination, the court stated:

> [N]o enforcement action or private suit has been commenced against [Cummings or the other plaintiffs] as a result. Moreover, although Plaintiffs allege that they intend to engage in similar conduct in the future, without an actual or imminent threat of enforcement of the statute the constitutional issues are not presented in a sufficiently "'clean-cut and concrete form'" to render this action ripe.'" *See* [*Renne*], 111 S. Ct. at 2339.
>
> Plaintiffs argue that this case is ripe because, although Defendants have conceded that they will not enforce the LAD against the institutional plaintiffs, they have not waived enforcement of the statute against Cummings or against the Church's individual members. The Court, however, disagrees with Plaintiffs' interpretation of Defendants' waiver as not including a waiver of enforcement against Cummings. The Defendants, recognizing the First Amendment concerns raised in this action, have represented that the LAD does not apply to and will not be enforced against Plaintiffs' religious worship, beliefs, practice, speech or refusal to speak.

> *See* Stewart Aff., ¶¶ 10-13. This Court reads these statements as clearly including Plaintiff Cummings. Accordingly, the Court sees no possibility of state enforcement against him.

*Presbytery II*, 830 F. Supp. at 248-49.

The state argues that the district court correctly held that none of the named plaintiffs face an imminent threat that the LAD's prohibitions against incitement or otherwise inducing or helping others to induce boycotts, any of its other prohibitions against discrimination or its notice posting requirement will be enforced against them. In support, the state contends that the complaint and its allegations refer to Cummings only in his capacity as pastor of an Orthodox Presbyterian Church. Because it has waived enforcement against the plaintiffs when they act in their capacity as religious organizations or as clergymen performing religious functions, the state concludes that Cummings does not face any imminent threat of enforcement, but yet refuses to guarantee that he will not be prosecuted if he acts as an individual outside the church.

Applying the usual standards for construing the allegations of a complaint which give the plaintiff the benefit of all favorable inferences that can be drawn from them,[8] we conclude that the complaint fairly asserts Reverend Cummings' rights as both a pastor and a citizen and therefore that the Stewart affidavit is insufficient to remove the threat of enforcement against Cummings in his individual capacity.

In order to determine what rights Cummings asserts, we turn to the amended complaint. Complaints need not be models of precise information. Rather, a complaint suffices when it serves fairly to notify the defendants of the facts and the alleged deprivation. *See, e.g., Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993). Moreover, when judged on

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[8] *See Markowitz v. Northeast Land Company*, 906 F.2d 100, 103 (3d Cir. 1990).

their face, complaints should be construed in favor of the party defending against a motion to dismiss. *Cf. id.* ("The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief.") (citing *Colburn v. Upper Darby Township*, 838 F.2d 663, 665-66 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989)); *Williams v. New Castle County*, 970 F.2d 1260, 1266 (3d Cir. 1992).

The state contends that the complaint asserts Cummings' rights only in terms of his institutional capacity. A careful review of the record, however, reveals a different conclusion. Although it is helpful for a complaint to specify if a party is bringing suit in his individual or official capacity, we are not aware of any rigid rule that requires an express statement of such capacity. We recognize that Cummings is listed as the "Rev. David B. Cummings" in the caption of the complaint, App. at 195, but his participation is nowhere limited to his institutional capacity.[9] Again, in paragraph 4 of the complaint, Cummings is identified as being an ordained minister of the Presbytery, the pastor of one of its New Jersey churches and a plaintiff, but no mention is made of his suing only as a leader of an institution. In paragraph 14, Cummings is described without limitation to his capacity as a clergyman or religious leader. In paragraph 51, the complaint states:

> Plaintiff Cummings, other pastors and members of their congregations . . . do speak out about homosexuality, bisexuality and heterosexual sex outside

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[9] Use of the term "Reverend" in written documents is generally a respectful acknowledgment of the clergyman's calling or profession. In the same way persons in other professions are respectfully addressed as "doctor," "attorney," "professor," etc. At oral argument, appellants' counsel stated he listed Cummings as the "Rev. David B. Cummings" in the caption "because that is his title." Transcript of Oral Argument, March 25, 1994 ("Tr.") at 5. He also indicated that if a pastor is suing in an official capacity he normally would add "as pastor of such and such" in the caption. *Id.*

> of marriage, make reasonable distinctions based on such practices, lobby against them, and circulate literature condemning them. They encourage, aid and abet discrimination and reasonable distinctions against homosexuals, bisexuals and heterosexuals engaging in sex outside of marriage.

App. at 218. Paragraph 53 of the complaint alleges:

> [P]laintiffs publish, circulate, issue, display, post and mail printed material condemning homosexuality, bisexuality and heterosexual sex outside of marriage, making reasonable distinctions based on such acts . . . .

*Id.* Paragraph 57 of the complaint alleges:

> Plaintiffs have always in the past, presently do and since the amendments have refused to knowingly buy from, contract with or otherwise do business with persons on the basis of that person's homosexual, bisexual or heterosexual practices.

*Id.* at 220. None of these allegations limit the acts Cummings avers he wishes to perform without fear of prosecution or reprisal under the LAD to acts he would perform only as a pastor of the OPC. Rather, the clear implication of these allegations, when we construe them in favor of the plaintiff, as we must, is that Cummings has in the past, currently does and in the future will engage in conduct both in his professional and personal life that could run afoul of the statute. We see nothing in the complaint that would support the state's conclusion that Cummings asserts only his right to preach and teach within the confines of the church as a clergyman or religious leader. To the contrary, the portions of the complaint just quoted indicate that Cummings, as an individual, plans to engage in conduct that has a potential for violating the LAD's ban on incitement of prohibited discrimination against male or female homosexuals in employment, commerce and places of

public accommodation by boycott or otherwise.[10] Thus, provided that a threat of enforcement restricting Cummings' First Amendment right of free speech exists, the controversy would be ripe. Focusing solely on the question of ripeness, however, it would not be sufficient for the complaint merely to assert Cummings' rights as a citizen. There must remain a credible threat of enforcement against him even though representations were made by the state in its affidavit disclaiming any intention to enforce the statute against religious institutions.

We have held that "[i]n order to present a justiciable controversy in an action seeking a declaratory judgment to protect against a feared future event, the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgement.'" *Salvation Army*, 919 F.2d at 192 (quoting *Steffel v. Thompson*, 415 U.S.

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[10] In an affidavit submitted in support of his opposition to summary judgment, Cummings specifically reaffirmed certain paragraphs of the complaint. He omitted, however, paragraphs alleging the intention to engage in prohibited conduct outside the church. The state argues that this omission indicates that Cummings does not intend to engage in such conduct outside the institutional setting therefore removing the possibility of prosecution.

We do not think that Cummings' failure to specifically reference the relevant paragraphs of the complaint is tantamount to a disavowal of their content. If, during the pendency of the litigation, Cummings were to disavow his intention to engage in proscribed conduct, that disavowal could deprive this case of ripeness. *See Salvation Army*, 919 F.2d at 192. At this preliminary juncture, however, we are advised Cummings intends to prove at trial the allegations contained in the complaint. At oral argument this intention was reiterated by his counsel, speaking as an officer of the court. Absent strong indications that the allegations of the complaint have been disavowed, we are reluctant to hold a first amendment freedom of expression claim is not ripe when the complaint adequately alleges that claim, without considering Cummings' standing to assert the chilling affect of the statute's prohibitions on freedom of expression, and we are equally reluctant to consider the standing issue on this record.

452, 460 (1974)). "Where the plaintiff seeks a declaratory judgment with respect to the constitutionality of a state statute, even where the attack is on First Amendment grounds, there must be a 'real and immediate' threat of enforcement against the plaintiff." *Id.* (quoting *Hardwick v. Bowers*, 760 F.2d 1202, 1206-07 (11th Cir. 1985), *rev'd on other grounds*, 478 U.S. 186 (1986)). This threat must remain extant throughout the course of the litigation and "[w]here an intervening event removes these conditions, the court must not address the now-speculative controversy." *Id.* (citing *Steffel*, 415 U.S. at 459 n.10 (remanding for determination of whether plaintiff still faced threat of prosecution)).

In paragraph 12 of the Stewart affidavit, the state has forsworn enforcement of the LAD with respect to church employment decisions. Stewart then states,

> Under this provision [regarding church employment practices], the plaintiffs here are free, without fear of prosecution, to make employment decisions which discriminate respecting a current or prospective employee's actual or perceived sexual orientation. Hence, such a "religious association or organization" may make decisions and engage in the practice of its sincerely-held religious beliefs within the limits only of the First Amendment. The Division has not and has no intention of construing nor enforcing the LAD in any manner which, liberally construed, would even tend or threaten to violate the sincere "tenets" of any religion. Moreover, the Division has not and has no intention to engage in any determination or judgment as to what is or is not a "religious activity" of a church, or to determine what is or is not a "tenet" of religious faith.

App. at 295-96. Although this paragraph could fairly be construed to remove the threat of enforcement against the church and its religious activities, we think it fails to eschew enforcement against speech or expressive conduct outside the

setting of a religious institution or office. Similarly, in paragraph 13 of his affidavit, Stewart avers that "the Division has not in the past prosecuted and has no intention to prosecute essentially exempt *churches* for sincerely-held religious belief or practice, or speech consistent with such belief, or for a refusal to engage in certain speech or for following their religious tenets, all within only the limits of the First Amendment." *Id.* at 296 (emphasis added). Moreover, at oral argument before this court, the state pointedly limited the scope of the immunity it offered:

> THE COURT: Do you agree with [plaintiffs' counsel's] interpretation of your affidavit?
>
> MR. LORENTZ: That the state has not waived enforcement against unnamed individuals, and against Reverend Cummings in his role outside of pastor because there's nothing in the complaint or anywhere in the case that indicates that he has any other role. Certainly, he is an individual.

Tr. at 25-26.[11]

The literal terms of the DCR waiver go no farther than the religious activities of the institutional plaintiffs and at oral

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[11] The colloquy continues:

> THE COURT: But [appellants] argued this morning . . . that the title of "Reverend" in that [sic] complaints is only descriptive in that he still remains as an individual plaintiff. Now is that sophistry or is there some merit to that?
>
> MR. LORENTZ: It is not our--we don't understand that the thrust of the attack that was launched on the statute originally before it was severely constricted was anything but by an institution.
>
> Obviously, because institutional protection of religion is greater under the first amendment than it is for individuals. Individuals are required to obey laws of general application.

Tr. at 26.

argument, counsel reiterated the limits of the waiver in this respect. It is nevertheless also the state's position that the case is not ripe absent an actual prosecution. That is not the law.

In *Steffel v. Thompson*, 415 U.S. 452 (1974), the United States Supreme Court held that where a plaintiff seeks to exercise the First Amendment's guarantee of freedom of expression, the state need not prosecute in order to present a ripe controversy. *Id.* at 459. In *Steffel*, the plaintiff attempted to distribute handbills in a shopping center protesting the United States's involvement in Vietnam. *Id.* at 455. After a prior encounter with police, plaintiff returned with a companion. *Id.* The police arrived and informed the protestors that if they remained, they would be arrested. *Id.* Plaintiff left although his companion stayed and was arrested. *Id.* at 456. Plaintiff then commenced an injunctive and declaratory action claiming the law interfered with his First Amendment right. *Id.* at 454-55. The state argued the case was not ripe because there was no prosecution. The Supreme Court disagreed. "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Id.* at 459; *see also McKay v. Heyison*, 614 F.2d 899, 904 (3d Cir. 1980) ("'When the plaintiff has alleged an intention to engage in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."'" (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 180 (1973))); Chemerinsky, *supra* at 103 ("[I]t is well established that a case is ripe because of the substantial hardship to denying preenforcement review when a person is forced to choose between forgoing possibly lawful activity and risking substantial sanctions.").

We recognize that *Steffel* differs from the instant case. There the state demonstrated its willingness to prosecute others. This added immediacy to Steffel's claim that he faced prosecution if he engaged in proscribed expressive activity. Here the state has forsworn prosecution of Cummings in his clerical role, but it has refused to forswear his prosecution if he were to step off the pulpit and engage in the activities he alleges his first amendment right to freedom of expression protects. The pointed nature of that refusal, both in the state's affidavit and at oral argument indicates to us that Reverend Cummings and others who engage in the expressive activity he describes face a real threat of prosecution. In short, to the extent this record eliminates any free exercise claims as unripe it does not do so with respect to the individual free expression claims Cummings appears to advance. Here, the state has had ample opportunity to indicate that it will not prosecute religiously motivated speakers under the aid and abet or boycott provisions. It has elected not to do so.[12]

Accordingly, in light of the state's refusal to waive prosecution against Cummings when he acts outside of his institutional capacity as a pastor of the OPC, we conclude the threat of prosecution is "real and substantial," *see Salvation Army*, 919 F.2d at 192, and at least the presence of Reverend Cummings as a plaintiff in this law suit presents interests sufficiently adverse to those of the state so as to satisfy the first prong of the *Step-Saver* inquiry.

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[12] The state contends that its waiver was crafted in terms of the institutional plaintiffs alone because the state considered the plaintiffs to be litigating in their institutional capacity alone and that its waiver should not be read too narrowly. The responses of counsel at oral argument before us, however, show the state still refuses to waive prosecution outside the religious setting once the plaintiffs made it clear that they sought to assert Cummings' rights as an individual. *See supra* typescript note 10. We have already rejected the contention *supra* typescript at 21-24 that the complaint fails to invoke the private rights of Reverend Cummings.

2. Conclusiveness

The second *Step-Saver* factor requires us to determine whether judicial action at the present time would amount to more than an advisory opinion based upon a hypothetical set of facts. *See Step-Saver*, 912 F.2d at 649. As mentioned *supra*, predominantly legal questions are generally amenable to a conclusive determination in a preenforcement context; however, "plaintiffs raising predominantly legal claims must still meet the minimum requirements for Article III jurisdiction." *Armstrong*, 961 F.2d at 421 (citing *Office of Communication of United Church of Christ v. FCC*, 826 F.2d 101, 105 (D.C. Cir. 1987) ("[T]he presence of 'a purely legal question' is not enough, of itself, to render a case ripe for judicial review, not even as to that issue.")).

In *Armstrong*, we approved a rationale used by the United States Court of Appeals for the Eleventh Circuit in *Atlanta Gas Light Co. v. United States Department of Energy*, 666 F.2d 1359 (11th Cir.), *cert. denied*, 459 U.S. 836 (1982). In *Atlanta Gas Light*, the court held that its conclusion of ripeness was supported by factors which included the fact that the parties' claims would not substantially change in future litigation, that the current parties were appropriate to raise the issues at bar and that the parties would be subject to enforcement of the challenged act were it implemented. *See Id.* at 1363 n.7.

Here, we see no reason why disposition of this case could not conclusively determine the largely legal issues at stake. Factual development would not add much to the plaintiffs' facial challenges to the constitutionality of the statute. To the extent that it is not distinguishable, we are unpersuaded by *Voluntary Association of Religious Leaders v. Waihee*, 800 F. Supp. 882 (D. Haw. 1992), where the court determined that a challenge similar to one now before us was not factually developed adequately enough to make the case ripe for disposition. *Id.* at 890. There, the plaintiffs challenged an amendment to an anti-discrimination statute that

added sexual orientation to the protected categories and made it illegal "to aid, abet, incite, compel, or coerce" any of the discriminatory practices listed by the statute. *Id.* at 884. The plaintiffs, who included a minister and a parishioner, "fail[ed] to allege that they are engaging in, or plan to engage in, any activities that would subject them to enforcement." *Id.* at 888. The court concluded that a vague allegation that a minister would preach to his employees about the evils of homosexuality was insufficient to pose any clear threat that he would be prosecuted under the statute. *Id.* at 888-89. To the extent, however, that the court concluded that a facial challenge to a statute that seeks to proscribe otherwise protected First Amendment conduct such as oral advocacy and boycott is not ripe until a concrete factual situation is before the court, *see id.* at 890, we disagree. Presumably, in order to give the court in *Waihee* a concrete factual situation, a prosecution would first be necessary. We believe that *Steffel* teaches that a plaintiff need not choose between prosecution and stifling otherwise protected activities.

Furthermore, the *Waihee* court relied on the Supreme Court decision in *Renne*. *Id.* *Renne* involved a challenge to a California law that prohibited political parties from endorsing candidates for non-partisan offices. *Renne*, 501 U.S. at 315. The Court there held that the plaintiffs' allegations that they sought to endorse officials in the future was insufficient to render the case ripe. *Id.* at 321.

Here, unlike *Renne*, Cummings alleges that he currently engages in speech and acts allegedly circumscribed by the LAD and that he will continue to do so in the future. Even if this case were finally dismissed as not ripe, Reverend Cummings or others who share his beliefs could in the future easily assert substantially similar facial attacks on the LAD in their individual capacities. Such claims would most likely parallel those claims already presented in the present action, and as such it is unlikely that there would be any change in the substance or clarity of the challenges to the LAD. Fur-

thermore, if the LAD is enforced against private citizens and Reverend Cummings engages in the acts alleged in paragraphs 49, 51, 57, and 69 of the complaint, in his individual capacity, he would appear to be exposed to a threat of enforcement. Reverend Cummings appears to be an appropriate party to raise the first amendment freedom of expression objections to the provisions of the LAD set out in the claim. Thus, the principles discussed in *Atlanta Gas Light* support a conclusion that this case is ripe if Reverend Cummings has at this point expressed enough of an adverse interest to the provisions of the LAD he refers to in the complaint to permit this case to go forward.

Indeed, it is hard to see how a more concrete factual situation would aid resolution of the plaintiffs' First Amendment free speech challenge to the statute. *See Armstrong*, 961 F.2d at 412. Such factual development is of minimal assistance in facial challenges such as this. Present resolution of the facial challenge would completely and decisively determine whether the amendments to the LAD that the plaintiffs object to affect the fundamental right of free speech the First Amendment protects. Accordingly, we believe the second *Step-Saver* element also favors holding the controversy to be ripe.

3. Utility

The final *Step-Saver* factor focuses on the utility served by current entry of a judgment resolving the facial challenge to the Act. In this inquiry we consider "whether the parties' plans of actions are likely to be affected by a declaratory judgment." *Step-Saver*, 912 F.2d at 649 n.9.

It appears to us that entry of a declaratory judgment deciding the free speech issues the LAD amendments pose in the instant case would be useful to the parties and others who could be affected. Although Cummings alleges that he will engage in allegedly prohibited conduct in the future, we assume his willingness to do so is likely to be affected by reso-

lution of this action.[13] Similarly, the state's effort to enforce certain portions of the amended LAD will be affected by the resolution of this litigation. Unlike the plaintiffs in *Armstrong* who "d[id] not face the threat of sanction for noncompliance with [the challenged act]," Cummings does. *Armstrong*, 961 F.2d at 423. A declaration of his rights and those of all others who would seek to engage in similar activity would permit a person to speak without fear of governmental sanction or regulation of their activities protected by the statute.

Accordingly, we conclude that a grant or denial of relief in this case would materially affect the parties and thus this *Step-Saver* factor also weighs in favor of our conclusion that this controversy is ripe. We express no opinion on the merits of this case, a task that involves the meaning and interpretation of the statutory provisions under attack and their effect on our fundamental constitutional right to freedom of speech. We think that task should be performed by the district court in the first instance.

We therefore conclude that Reverend Cummings has demonstrated a ripe controversy under the three factor test set forth in *Step-Saver*. Because the state's representation regarding enforcement does not eliminate the threat of enforcement against plaintiff Cummings and Cummings has averred that he does and will engage in potentially violative conduct, the parties present adverse interests in this dispute. Moreover, a final resolution of this dispute would be both conclusive on the issue and of practical help to those who seek to engage in

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[13] Current First Amendment jurisprudence does not require a Thoreau or a Gandhi who is willing to go to jail for his beliefs but permits the more cautious Emersons among us to assert our fears of interference with our this country's fundamental rights in the civilized atmosphere of a court before subjecting ourselves to the risk of arrest and jail.

potentially protected activity. We hold, therefore, that the district court erred in dismissing the action as unripe.[14]

## V.

For the foregoing reasons, we will reverse the order of the district court dismissing Reverend Cummings first amendment freedom of expression claims for lack of jurisdiction and remand for further proceedings consistent with this opinion. The state's representations clearly show that the claims of the institutional plaintiffs, Presbytery and Calvary are not ripe. Stewart, the Director of the Division on Civil Rights in the Department of Law and Public Safety of the

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[14] Our reasons for so concluding also establish Cummings' standing to assert a violation of his First Amendment rights. In order for a party to present a justiciable controversy, the litigant must be "entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Selden*, 422 U.S. 490, 498 (1975). At a constitutional minimum, the litigant seeking the intervention of the federal court:

> must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"[;] (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court"[;] and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative[.]"

*Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 113 S. Ct. 2297, 2301-02 (1993). It is clear that Cummings can assert his own rights as an individual and, in light of our conclusion that the state has not foregone the threat of prosecuting Cummings for what he claims are the expressive activities he wishes to engage in as a citizen, we conclude Cummings has standing without reference to the plaintiff's standing to assert the First Amendment rights of others whose expressive activities may be chilled by the threat of prosecution under the LAD.

State of New Jersey and an officer of the court swears: "[the State] . . . has no intention to prosecute essentially exempt churches for sincerely-held religious belief or practice, or speech consistent with such belief . . . . [T]his would include *N.J.S.A.* 10:5-12c, *N.J.S.A.* 10:5-12e, *N.J.S.A.* 10:5-12j, *N.J.S.A.* 10:5-12 l and *N.J.S.A.* 10:5-12m." App. at 296-97. Therefore, we will affirm the district court's decision as it applies to the institutional plaintiffs.

RE: THE PRESBYTERY OF NEW JJERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, et al., Appellants V. JAMES FLORIO, GOVERNOR OF NEW JERSEY, ET AL., NO. 93-5559

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ROSENN, *Circuit Judge*, dissenting.

The majority correctly concludes that this suit is not ripe with respect to the institutional parties. However, I disagree with the majority's conclusion that "the controversy is ripe" because Rev. David Cummings arguably alleges as an individual that the statute threatens his right of speech. This conclusion ignores completely the allegations in the complaint that he is suing as the pastor of the Orthodox Presbyterian Church of New Jersey. I therefore respectfully dissent because I believe this case is not ripe for judicial disposition.

Article III, section 2 of the United States Constitution limits federal jurisdiction to actual "cases" and "controversies." U.S. Const. art III § 2. Thus, it forbids the issuance of advisory opinions. "The case or controversy requirement must be met regardless of the type of relief sought, including declaratory relief." *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992) (citation omitted). Additionally, "even if a declaratory judgment would clarify the parties' legal rights, it should ordinarily not be granted unless 'the parties' plans of actions are likely to be affected by a declaratory judgment.'" *Id.* at 412 (citation omitted). Also, in cases concerning the Constitutionality of state statutes, this court should consider "the advantage of permitting state courts further opportunity to construe the challenged provision and perhaps in the process materially alter the question to be decided." *Id.* (citation omitted) (quotation omitted). Finally, this court must presume that it lacks jurisdiction unless the record affirmatively demonstrates that jurisdiction exists;

i.e. the plaintiff must persuade this court that jurisdiction exists. *Renne v. Geary*, 501 U.S. 312, 316 (1991).

Federal courts consider three primary factors when reviewing a declaratory judgment action for ripeness: (1) adversity of interest between plaintiffs and defendants, (2) conclusivity, and (3) utility. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 647 (3d Cir. 1990).[15] The court weighs these and other relevant factors to determine if the issue is ripe. Here, the case is not ripe because no adversity of interest exists between the parties involved in this suit in light of the extensive protection afforded by New Jersey's Law Against Discrimination (LAD) from interference with plaintiffs' religious practices. Moreover, the Director of New Jersey's Division on Civil Rights has represented that the State has not in the past prosecuted and has no intention to prosecute exempt religious organizations for religious beliefs, practices, or speech. Therefore, the conclusiveness and utility of a judgment rendered at this time are doubtful.

The majority correctly notes that the State of New Jersey has expressed its intention not to prosecute Rev. Cummings for actions taken as a member of the clergy engaging in the performance of religious functions and that the State has refused to waive enforcement of LAD against Cummings as an individual. The majority properly concludes that Cummings cannot pursue this suit as a representative of the church. The majority, however, strains in an effort to conclude that Cummings has sued in his individual capacity and in that capacity can pursue this case.

Cummings is clearly identified in the complaint as "Rev. David B. Cummings." *see e.g.*, plaintiffs' caption in First Amended Complaint and § 1 and 4. The complaint does not allege that he sues in a secular capacity as an individual

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[15] *See*, majority opinion at 14-19 for a thorough and informative discussion of ripeness jurisprudence.

church member. Moreover, when this court heard an earlier appeal in this same case on an appeal from an order denying the plaintiffs' application for a preliminary injunction, its memorandum opinion addressed Cummings only in his role as "an ordained minister of the Presbytery and the pastor of one of its member churches." In that appeal, appellants did not maintain that Cummings was acting as an individual and appellants have never amended their complaint to include Cummings or others as individual plaintiffs. Paragraph 4 of the complaint in this case specifically avers: "plaintiff, Rev. David B. Cummings, is an ordained minister of the Presbytery, and the pastor of one of its New Jersey churches." No reference is made to him as an individual. If any residual question still remains at this point as to Cummings' status in this litigation, it is dissipated by paragraph 45 of the complaint. It states: "[t]he individual plaintiff [Cummings] is an agent of these entities [the churches]."

The majority does not point to any language that describes Cummings as an individual.[16] In fact, the first of the three paragraphs from the complaint quoted by the majority in support of their conclusion begins "[p]laintiff Cummings, *other pastors* and members of their congregations . . . ." ¶ 51 of complaint (emphasis added). The plaintiffs' use of the words "other pastors" immediately after "plaintiff Cummings" confirms that Cummings is acting as a pastor in this litigation and not as an individual. The additional paragraphs from the complaint quoted by the majority contain references to actions by "plaintiffs" without providing any evidence that the referenced "plaintiffs" include any individuals.

The district court observed that the individual members of the appellant churches were not plaintiffs in this action. *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*,

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[16] Interestingly, of the three paragraphs quoted by the majority, Cummings only adopts paragraph 53 in his Affidavit in support of the complaint.

830 F.Supp 241, 249 (D.N.J. 1993). The record supports this observation. First, the complaint's caption lists only one individual, Reverend Cummings.[17] Second, the record contains no information demonstrating that any of the church members are represented by the named plaintiffs or have consented to inclusion in this law suit.[18] The district court properly noted that a ripe declaratory judgment action requires "a 'real and immediate' threat of enforcement *against the plaintiff*." 830 F.Supp at 249 (quoting *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 192 (3d Cir. 1990) (emphasis added by district court). Cummings brought this suit as an institutional representative. After the State's affidavit averred that it would not prosecute him under LAD for actions taken as a pastor, no legitimate case or controversy remained.

Even if Cummings had pursued this case as an individual from the beginning, it is not ripe. "Where the plaintiff seeks a declaratory judgment with respect to the constitutionality of a state statute, even where the attack is on First Amendment grounds, there must be a 'real and immediate' threat of enforcement." *Salvation Army*, 919 F.2d at 192 (quoting *Hardwick v. Bowers*, 760 F.2d 1202, 1206-7 (11th Cir. 1985)). Nothing in the record demonstrates any realistic threat that the state will enforce the amendments against Cummings as an individual. The State has merely refused to waive its right to

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[17] I do not agree with the majority's supposition that "Reverend" is used as a purely honorary term. In the context of this litigation, where the plaintiffs have carefully shielded Cummings from the possibility of counter-claims and the assessment of costs, "Reverend" is used precisely; it signifies Cummings' role as an institutional representative and separates Cummings the church representative, the plaintiff in this case, from Cummings the individual.

[18] On appeal, appellant contends that they are acting on behalf of their church members. However, they have provided no persuasive evidence to support this contention; mere references to church members within the body of the complaint are insufficient.

prosecute Cummings; it has not taken any steps to prosecute him or anyone else under LAD. In a careful analysis, the able and experienced district judge noted that "[t]he plaintiffs' professed fears of state enforcement of the LAD against their members appear to be based only on imagination or speculation, which is insufficient to create a ripe controversy." 830 F.Supp at 249 (citation omitted).

Despite the State's refusal to waive enforcement of the LAD against Cummings and other members of the congregation as individuals, the record supports the district court's finding that there is no realistic threat that the State will enforce the law against them. In the almost two years since the LAD became effective, neither the State nor any private individual has filed a complaint against a church member. Moreover, the district court found that the threat of an administrative or private suit has not had any discernible effect on their conduct. 830 F.Supp at 249. To the contrary, the plaintiffs concede that since the enactment of the LAD in 1992, they have discriminated and spoken out against people based on their sexual orientation. The court thus found that the prospect that the plaintiffs will alter their actions out of fear of a suit under the LAD is highly unlikely. 830 F.Supp at 249. *See Salvation Army*, 919 F.2d at 193.

The plaintiffs have not demonstrated a real and substantial probability that the litigation they fear will occur; almost two years have passed since the LAD became effective and no private suit or administrative complaint has been filed. *See Armstrong*, 961 F.2d at 412. Additionally, the district court found that there is "no credible evidence that any person or organization is contemplating such an action." 830 F.Supp at 249. The theoretical possibility that someone may file such a suit at some time in the future is not sufficient to render this action ripe. *See Salvation Army*, 919 F.2d at 193. Moreover, this court has noted that the relief the plaintiffs seek would not bind unidentified private parties and protect plaintiffs from private suits.

In addition to showing that the issues in this case are not fit for judicial decision, the record also shows that the withholding of an opinion at this time will not work a hardship on the parties. Despite the plaintiffs' arguments to the contrary, they will suffer no "immediate and significant" hardship from the district court's decision not to adjudicate this action at this time. *See Felmeister v. Office of Attorney Ethics, Div. of New Jersey Administrative Office of Courts*, 856 F.2d 529, 537 (3d Cir. 1988). The court found that the plaintiffs have not changed their behavior due to the LAD amendments, that defendants will not subject the plaintiffs to an enforcement action, and that private enforcement of the statute against the plaintiffs is uncertain. Thus, the court did not err in concluding that its withholding of an opinion will not work a hardship on the plaintiffs.

Regardless how one views the merits of the amendments to the LAD, there is no reason whatsoever why this court should struggle to construct a theoretical controversy where none exists. Under the three *Step-Saver* factors, this case is not ripe for resolution. Therefore, I would affirm the order of the district court dismissing plaintiffs' action.

**The PRESBYTERY OF NEW JERSEY OF the ORTHODOX PRESBYTERIAN CHURCH, Calvary Orthodox Presbyterian Church of Wildwood, and Rev. David B. Cummings, Plaintiffs,**

**v.**

**James FLORIO, Robert Del Tufo, Marilyn Flanzbaum, Roman Angel, Betty Carson, Olga L. Vasquez-Clough, Felton Lingo, Sr., Reinhold W. Smyczek, Casey Tam, C. Gregory Stewart, John Doe(s), and Jane Doe(s), Defendants.**

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Civ. A. No. 92-1641 (WGB).
United States District Court,
D. New Jersey.

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Aug. 10, 1993.

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Thomas S. Neuberger, Wilmington, DE, and Richard J. Traynor, Morristown, NJ, for plaintiffs.

Robert J. Del Tufo, Atty. Gen. Of N.J. by William H. Lorentz, Charles S. Cohen, Andrea M. Silkowitz, Div. Of Law, Newark, NJ, for State defendants.

Evans, Osborne & Kreizman by Lewis H. Robertson, Little Silver, MJ, for amicus curiae, the American Civ. Liberties Union of N.J.

Montgomery, McCracken, Walker & Rhoads by Louis A. Petroni, Cherry Hill, NJ, for Religious amicus curiae [1]

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[1] James E. Andrews as Stated Clerk of the Prebyterian Church (U.S.A.) General Assembly; the Diocesan Council of the Episcopal Diocese of Newark, Right Rev. John S. Spong, Bishop of the Episcopal Diocese of Newark; the Lutheran Office of Governmental Ministry in New Jersey the

BASSLER, District Judge:

Defendants James Florio, Robert Del Tufo, Marilyn Flanzbaum, Roman Angel, Betty Carson, Olga L. Vasquez-Clough, Felton Lingo, Sr., Reinhold W. Smyczek, Casey Tam, and C. Gregory Stewart move to dismiss this action as non-justiciable. For the following reasons, the Court will grant the motion.

## *I. Background*

Plaintiffs, the Presbytery of New Jersey of the Calvary Orthodox Presbyterian Church of Wildwood ("Calvary"), and Rev. David B. Cummings ("Cummings"), bring this constitutional challenge to certain recently-amended provisions of New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et. seq.* that prohibit discrimination based on "affectional or sexual orientation." Defendants are the Governor of New Jersey, various state officials charged with enforcing state law, and unnamed private individuals who Plaintiffs fear will sue them under the LAD.

### A. The Law Against Discrimination

New Jersey's LAD, which was enacted in 1945, prohibits discrimination in employment, labor organization membership, public accommodations, and real estate, financial and business transactions. Prior to 1992, the LAD applied to discrimination based on race, creed, national origin, age, sex, marital status, and several other characteristics. *See, e.g.* N.J.S.A. 10:5-3 (supp.1978). In 1992, the LAD was amended to include as a protected category "affectional or sexual orientation," which is defined as "male or female" heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or iden-

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New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations; the New Jersey Synod Council of the New Jersey Synod, Evangelical Lutheran Churches in America; the New Jersey Council of Churches; and the United Church of Christ Office for Church in Society.

tified by others as having such an orientation." N. J. S.A. 10:5-5(hh)(1993).

The LAD makes it unlawful for an employer to discriminate against any individual because he or she possesses any of the enumerated characteristics or "to print or circulate or cause to be printed or circulated any statement . . . which expresses, directly or indirectly" such discrimination. N.J.S.A. 10:5-12(a), (c) (1993). Similar prohibitions apply to places of public accommodation. *See* N.J.S.A. 10:5-12(f) (1993). The statute also forbids any person from refusing to transact business with another person for a discriminatory reason. N.J.S.A. 10:5-12*(l)*, (m) (1993).

In addition, the LAD makes it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e) (1993). A similarly-worded section makes it illegal.

> [f]or any person to aid, abet, incite, compel, coerce or induce the doing of any act forbidden by subsections l and m [which prohibit discrimination in business transactions], or to attempt or to conspire to do so. Such prohibited conduct shall include, but not be limited to:
>
> (1) Buying from, selling to, leasing from or to, licensing, contracting with, trading with, providing goods, services, or information to, or otherwise doing business with any person because that person does, or agrees or attempts to do, any such act or any act prohibited by this subsection n.; or
>
> (2) Boycotting, commercially blacklisting or refusing to buy from, sell to, lease from or to, contract with, provide goods, services or information to, or otherwise do business with any person because that person has not done or refuses to do any such act prohibited by this subsection n.; provided that this subsection n. shall not prohibit refusals or other actions either pertaining to employee-

> employer collective bargaining, labor disputes, or unfair labor practices, or made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

N.J.S.A. 10:5-129n0 (1993). The LAD also forbids "any person whose activities are included within the scope of this act to refuse to post or display such notices concerning the rights or responsibilities of persons affected by this act as the Attorney General may by regulation require." N.J.S.A. 10:5-12(j)(1993).

The LAD provides, however, that "it shall not be an unlawful employment practice ... for a religious association or organization ... in following the tenents of its religion in establishing and utilizing criteria for employment of an employee." N.J.S.A. 10:5-12(a) (1993); *see* Statement of Senate State Government, Federal and Interstate Relations and Veterans Affairs Committee, Senate No. 1608-L.1977, c.122 (stating that, under LAD, it is "lawful for a religious association or organization to use the "tenents of its religion' in 'establishing and utilizing criteria' for hiring an employee."). The statute further states that it is not to be construed to apply to "any institution, bona fide club, or place of accommodation which is in its nature distinctly private; [or] to any educational facility operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5(*l* ) (1993). Moreover, it provides that

> nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental or real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the re-

ligious principles for which it is established or maintained.

N.J.S.A. 10:5-5(n)(1993).

A person discriminated against in violation of the LAD may obtain relief either by filing a complaint with the New Jersey Division of Civil Rights ("DCR") or by commencing suit in the New Jersey Superior Court without first filing an administrative complaint. N.J.S.A. 10:5-13 (1993). Moreover, "any individual who has been discriminated against" have standing to enforce the provisions of the LAD. N.J.S.A. 10:5-38 (1993). The DCR is entitled to intervene in any private enforcement action. N.J.S.A. 10:5-13 (1993). The remedies authorized by the statute include awards of compensatory and punitive damages, fines and attorneys fees. *See* N.J.S.A. 10:5-3, 10:5-14.1a, 10:5-27.1 (1993). The Legislature has explicitly stated that the LAD is to be liberally construed. *See* N.J.S.A. 10:5-3 (1993).

B. Plaintiffs Challenge

The Orthodox Presbyterian Church (the "Church") is a small nationwide denomination with 19 member churches, including Calvary, and 2,113 members in New Jersey. The Presbytery is the governing body of the denomination, and Cummings is an ordained minister of the Presbytery and the pastor of a member church. The Church, which split from the Presbyterian Church (U.S.A.) in 1936 because of what it viewed as the church's doctrinal error, teaches that homosexuality, bisexuality and heterosexual sex outside of marriage are grievous sins. Plaintiffs therefore avow that they discriminate against homosexuals, bisexuals and heterosexuals engaged in sex outside of marriage and publicly condemn these practices.

The "affectional or sexual orientation" amendments to the LAD became effective on January 19, 1992. Three month later, on April 15, 1992, Plaintiffs commenced this action. Plaintiff's alleged that the following sections of the LAD, as

amended, violated their First, Fifth, Ninth and Fourteenth Amendment rights: the provisions applicable to employers, N.J.S.A. 10:5-12(a) & (c), and public accommodations, N.J.S.A. 10:5-12(f); the "aid, abet, incite" provisions, N.J.S.A. 10:5-12(e) & (n); the notice-posting provision, N.J.S.A. 10:5-12(j); and the provisions regarding discriminatory refusals to do business, N.J.S.A. 10:5-12(l) & (m). Plaintiffs requested declaratory and injunctive relief.

On May 15, 1992, Plaintiffs sought a preliminary injunction against enforcement of the amended statute. On June 5, 1992, Defendant's responded to Plaintiff's motion and also filed the motion to dismiss now before this Court.

In response to the motion for preliminary restraints, the Director of the DCR submitted an affidavit setting forth the way in which the DCR, with the advice of the Attorney General, has interpreted the LAD's applicability to religious institutions. *See* Affidavit of C. Gregory Stewart dated June 4, 1992 ("Stewart Aff."). The Director stated that the DCR does not consider places of worship to be "public accommodations," and therefore the LAD provisions applicable to public accommodations have never been and would not now be applied to them. Stewart Aff., ¶ 9-10. The Director further stated, consistent with NJ.S.A. 10:5-12(a), that "a church or other place or institution whose purposes [sic] is housing religious worship, practice or activities" is not "subject to the LAD when it makes employment decisions based upon sincerely-held, First Amendment-protected, religious beliefs." *Id.*, ¶ 11. Moreover, due to "First Amendment concerns,"

> the Division has not in the past prosecuted and has no intention to prosecute [under N.J.S.A. 10:5-12(c), (e), (f), (j), (l ) & (m) ] essentially exempt churches for sincerely-held religious belief or practice, or speech consistent with such belief, or for a refusal to engage in certain speech or for following their religious tenets. . . . Hence, the Division would not even attempt to enforce

those provisions in the circumstances of sincerely-held religious reasons such as plaintiffs express here. . . .

*Id.*, ¶ 13.

The Director also made the following general statements:

It has been the consistent construction and interpretation of the LAD that, consonant with constitutional legal barriers respecting legitimate belief and free exercise protected by the First Amendment, the State was not authorized to regulate or control religious worship, beliefs, governance, practice or liturgical norms, even where ostensibly or colorably at odds with any of the LAD prohibited categories of discrimination

* * * * * *

Moreover, the Division has not and has no intention to engage in any determination or judgment as to what is or is not a "religious activity" of a church, or to determine what is or is not a "tenet" of religious faith. Within First Amendment limits, all of plaintiffs' claimed religiously-based free exercises of faith are unthreatened by a reasoned construction of the LAD consistent with its meaning and long enforcement history.

*Id.*, pp 10,12.

After a hearing on June 19, 1992, this Court in an oral opinion denied Plaintiffs' preliminary injunction application.[2] The Court based the denial on two grounds: that the Plaintiffs failed to demonstrate a likelihood of success on the merits, and that they were unable to show that they would suffer irreparable harm if the requested relief were denied.

Plaintiffs immediately appealed to the United States Court of Appeals for the Third Circuit, which on December 14, 1992 affirmed the denial of the preliminary injunction.

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[2] The Court's oral opinion is unofficially reported at 60 FEP Cases 805, 1992 WL 414680 (D.N.J.1992).

*Presbytery v. Florio*, No. 92-5339 (3d Cir. Dec. 14, 1992) (unpublished memorandum opinion). The Court of Appeals agreed that Plaintiffs were faced with no immediate threat of enforcement by the DCR. *Id.* at 9. It noted, however, the difficulty in assessing the threat posed by private enforcement actions:

> The plaintiffs have not adduced any direct evidence that any private party is contemplating a suit against them, but private parties often do not issue advance public statements regarding their intention to file civil actions. We also understand why the plaintiffs' fears are not allayed by the DCR's statutory right to intervene in any private lawsuit and by the DCR's nonbinding interpretation of the LAD.

*Id.* at 11. Nevertheless, the court deemed it unnecessary to determine whether any private suit was imminent because it found that a preliminary injunction would not shield Plaintiffs from such a suit. *Id.* at 11-12. The court, however, "express[ed] no view as to the merits of the underlying claim." *Id.* at 13.

The parties agree that the DCR's representations and the decisions of this Court and the Court of Appeals have significantly narrowed the scope of this case. The constitutionality of only three provisions remains contested: N.J.S.A. 10:5-12(e), which makes it unlawful "[f]or any person ... to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so;" NJ.S.A. 10:5-12(n), which makes it illegal "for any person to aid, abet, incite, compel, coerce or induce" boycotts or refusals to do business; and NJ.S.A. 10:5-12(j), the notice-posting requirement. Plaintiffs challenge the "aid, abet, incite ..." language of Section 12(e) as a violation of pure speech, the boycott prohibition of Section 12(n) as impermissible content-based discrimination, and the posting requirement of Section 12(j) as a violation of freedom of conscience. *See* February 8, 1993 Transcript at 8-9. Plaintiffs concede, however, that in light of

Defendants' representations, the applicability of even these sections to the two institutional plaintiffs, the Presbytery and Calvary, is no longer at issue. *See id.*; Plaintiff's Post-Argument Brief at 2.

*II.* Discussion

Defendants make two arguments in support of their motion to dismiss. First, they contend that Plaintiffs' challenge is nonjusticiable, arguing both that Plaintiffs do not have standing to litigate this action and that their claims are not ripe for adjudication. Alternatively, they exhort this Court to abstain under Railroad Commission of *Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).[3] However, because the Court agrees that the justiciability requirement of ripeness has not been satisfied in this case, it is unnecessary to address Defendants' standing and abstention arguments.

The Constitution limits the jurisdiction of the federal courts to the resolution of actual "cases" and "controversies." U.S. Const. art. III, § 2. The case or controversy requirement must be satisfied in all actions, including declaratory judgment actions. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950); *see* 28 U.S.C. § 2201 (a). It is this requirement that has engendered the justiciability doctrines of ripeness, which concerns when an action may be brought, and standing, which concerns who may bring a ripe action. *Armstrong World Indus., Inc. v. Adams,* 961 F.2d 405, 411 & nn. 12-13 (3d Cir.1992).

"Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing

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[3] If Pullman abstention were appropriate, however, proper application of the doctrine would result in a stay and the retention of jurisdiction, not in dismissal of the case. *See Zwickler v. Koot* 389 U.S. 241, 244 n.4, 88 S.Ct.391, 393 n.4, 19 L.Ed.2d 444 (1967).

so." *Renne v. Geary*, --- U.S. ---, ----, 111 S.Ct. 2331, 2336, 115 L.Ed.2d 288 (1991).

Plaintiffs, as the parties invoking this Court's jurisdiction, bear the burden of demonstrating that this case is justiciable. Because the federal courts' jurisdiction is constitutionally limited, it is presumed that jurisdiction is lacking unless " 'the complainant clearly ... allege[s] facts demonstrating that he is the proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.' " *Id.*

The ripeness doctrine seeks to prevent the courts "from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). "[R]uling on federal constitutional matters in advance of the necessity of deciding them [is to be avoided], to postpone judicial review where it would be premature." *Armstrong*, 961 F.2d at 413, 424 (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936)). To determine whether a particular matter is ripe, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. at 1515.

In this action, Plaintiffs seek declaratory and injunctive relief. Assessing the ripeness of a declaratory judgment action poses special problems. As the Supreme Court has observed,

> [t]he difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient im-

> mediacy and reality to warrant the issuance of a declaratory judgment.

*Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). The primary factors that the Third Circuit has considered in making this determination have been "the adversity of the interest of the parties, the conclusiveness of the judicial judgment, and the practical help, or utility of that judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir.1990); *see Armstrong*, 961 F.2d at 411.

It is not necessary for Plaintiffs to have suffered "a completed harm" to have a ripe controversy for purposes of a declaratory judgment action. *Armstrong*, 961 F.2d at 412. It is necessary, however, that Plaintiffs demonstrate a real and substantial probability that the feared future event will occur. *Id.* Moreover, the threat "must remain 'real and immediate' throughout the course of the litigation." *Salvation Army v. New Jersey Dept. of Community Affairs,* 919 F.2d 183, 192 (3d Cir.1990). Thus, if intervening events eliminate the threat, "the court must not address the now-speculative controversy." *Id.* In addition, there must be a showing that a declaratory judgment would be "a binding resolution of the matter," *Warner Cable Communications, Inc. v. Borough of Schuylkill Haven,* 784 F.Supp. 203, 208 (E.D.Pa.1992), and that it would likely affect the parties' plans of actions. *Step-Saver*, 912 F.2d at 648-49.

In their complaint, Plaintiffs allege that they

> have always in the past, presently do and since the 1992 amendments, have directly or directly discriminated against and made reasonable distinctions based upon homosexuality, bisexuality and heterosexual sex outside of marriage. For example, in New Jersey the plaintiffs express, speak and preach against homosexuality, adultery and fornication, calling it variously an abomination and sinful. . . . They also disseminate and circulate such

> speech and distinctions [sic] throughout New Jersey and the world.... [T]hey even print and disseminate materials condemning sexual sins.... Plaintiff, and their members, also inquire about the sexual practices of prospective employees and are continuing to do so despite the existence of the 1992 amendments. . . .

Amended Complaint, ¶ 49; *see id.*, pp 51, 53. In addition, they state that they will refuse to post signs stating that they do not discriminate based on affectional or sexual orientation. *Id.*, 54. They further state that they "have always in the past, presently do and since the amendments have refused to knowingly buy from, contract with, or otherwise do business with persons on the basis of that person's homosexual, bisexual or heterosexual practices." *Id.*, ¶57.

However, Plaintiffs' allegations of their past discriminatory actions do not make this action ripe, given that they have not suffered any adverse consequences from that conduct. *See Renne*, --- U.S. at ----, 111 S.Ct. at 2338. Plaintiffs readily admit that they have openly discriminated despite the existence of the 1992 amendments, yet no enforcement action or private suit has been commenced against them as a result. Moreover, although Plaintiffs allege that they intend to engage in similar conduct in the future, without an actual or imminent threat of enforcement of the statute the constitutional issues are not presented in a sufficiently " 'clean-cut and concrete form' " to render this action ripe. *See id.* at ----, 111 S.Ct. at 2339.

Plaintiffs argue that this case is ripe because, although Defendants have conceded that they will not enforce the LAD against the institutional plaintiffs, they have not waived enforcement of the statute against Cummings or against the Church's individual members. The Court, however, disagrees with Plaintiffs' interpretation of Defendants' waiver as not including a waiver of enforcement against Cummings. The Defendants, recognizing the First Amendment concerns raised in this action, have represented that the LAD does not apply

to and will not be enforced against Plaintiffs' religious worship, beliefs, practice, speech or refusal to speak. *See* Stewart Aff., pp 10-13. This Court reads these statements as clearly including Plaintiff Cummings. Accordingly, the Court sees no possibility of state enforcement against him.

The Court recognizes that the Defendants' waiver does not by its terms preclude state enforcement of the statute against the Church's individual members. Those members, however, are not plaintiffs in this action. A ripe declaratory judgment action requires "a 'real and immediate' threat of enforcement *against the plaintiff*." *Salvation Army,* 919 F.2d at 192 (emphasis added). Moreover, even if the Church's members were parties, nothing in the record indicates any realistic threat that the state will enforce the amendments against them. Rather, Plaintiffs' professed fears of state enforcement of the LAD against their members appear to be based only on imagination or speculation, which is insufficient to create a ripe controversy. *See id. (citing Younger v. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971)).

Plaintiffs also contend that this case is ripe because they remain subject to the possibility of private suits, which chills their exercise of their First Amendment rights. However, "where the plaintiff seeks a declaratory judgment with respect to the constitutionality of a state statute, even where the attack is on First Amendment grounds, there must be a 'real and immediate' threat of enforcement...." *Salvation Army*, 919 F.2d at 192. Even a plaintiff alleging a chilling effect on his or her constitutional rights must show "a specific present objective harm or a threat of specific future harm." *Laird v. Tatum,* 408 U.S. 1, 14, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972). Mere allegations of a chilling injury that are "not substantiated by evidence [of] a present and concrete effect" are not enough. *Salvation Army*, 919 F.2d at 193.

Plaintiffs offer no evidence that the threat of a private suit has had, or will have, any discernible effect on their conduct. *See id.* In fact, they concede that since the enactment of

the 1992 amendments, they have discriminated and spoken out against people based on their sexual orientation. Moreover, "the prospect that [Plaintiffs] will alter [their actions] ... out of fear of such a suit seems highly unlikely." *Id.*

Plaintiffs also have not demonstrated a real and substantial probability that the litigation they fear will occur. *See Armstrong,* 961 F.2d at 412. Almost a year and a half has passed since the amendments' effective date and not a single private suit or administrative complaint has been filed. There is, moreover, no credible evidence that any person or organization is contemplating such an action. Although the Court recognizes that it is difficult to gauge the threat of a private enforcement action, the theoretical possibility that such a suit may at some point be filed against Plaintiffs by some unnamed and unknown private party is not enough to render this action ripe. *See Salvation Army*, 919 F.2d at 193.

Additionally, it is questionable whether the relief Plaintiffs seek would bind the unidentified private parties of whom Plaintiffs profess such fear. As the Third Circuit recognized in its December 14, 1992 decision, the issuance of an injunction in this case would not necessarily protect Plaintiffs from private suits. *Presbytery v. Florio,* No. 92-5339, slip op. at 11-12 (3d Cir. Dec. 14, 1992); *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 112, 89 S.Ct. 1562, 1570, 23 L.Ed.2d 129 (1969). That court also has questioned whether constitutional adjudication in a declaratory judgment action can bind non-participants. *See Salvation Army*, 919 F.2d at 193. Therefore, any decision in this lawsuit would likely not be "a binding resolution of the matter." *Warner Cable,* 784 F.Supp. at 208.

Plaintiffs argue that this action is ripe for judicial determination because the issues presented are purely legal ones. The Court disagrees. As another United States District Court stated in a similar challenge to an anti-discrimination statute much like the LAD, "the issues raised by Plaintiffs are not purely legal, but instead are fact and application specific."

*Voluntary Ass'n of Religious Leaders v. Waihee,* 800 F.Supp. 882, 890 (D.Hawaii 1992). Moreover, plaintiffs raising predominantly legal claims still must meet the case or controversy requirement. *Armstrong*, 961 F.2d at 421. "[T]he presence of a 'purely legal question' is not enough, of itself, to render a case ripe for judicial review, not even as to that issue." *Id.* (quoting *Office of Communications of the United Church v. FCC*, 826 F.2d 101, 105 (D.C.Cir.1987)). Even a First Amendment overbreadth challenge "should not be entertained without the benefit of a ripe case[;]" otherwise, the overbreadth doctrine could be used improperly as " 'a means of mounting gratuitous wholesale attacks upon ... state laws.' " *Voluntary Ass'n. of Religious Leaders,* 800 F.Supp. at 890 (quoting *Renne*, --- U.S. at ----, 111 S.Ct. at 2340).

Where, as here, the constitutionality of a state statute is at issue, also relevant to the ripeness inquiry is "the degree to which postponing federal judicial review would have 'the advantage of permitting state courts further opportunity to construe [the challenged provisions], and perhaps in the process "materially alter the question to be decided." ' " *Armstrong,* 961 F.2d at 412; *See Renne*, --- U.S. at ---, 111 S.Ct. at 2339. The amendments here at issue have yet to be construed by the New Jersey courts. In fact, regulations interpreting them have not even been promulgated by the DCR, and the signs that Plaintiffs state that they will refuse to post have not yet been published.

Finally, no "immediate and significant" hardship, *See Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 537 (3d Cir.1988), will result to Plaintiffs from withholding court consideration at this time. In light of Defendants' representations, the Court is confident that they will not subject Plaintiffs now or in the future to enforcement of any of the challenged LAD provisions. As discussed above, the Court finds the mere existence of the private right of action to have no present effect on Plaintiffs, and the likelihood of private enforcement of the statute against them to be uncertain. Moreo-

ver, this dismissal is not on the merits of Plaintiffs' claims and thus is necessarily without prejudice.

Therefore, the Court finds that this case does not present a ripe controversy. The Court recognizes the importance of the First Amendment issues raised by Plaintiffs in this case. However, it is precisely because of their "fundamental and far-reaching import" that this Court cannot decide these issues on "the amorphous and ill-defined factual record presented...." *Renne,* --- U.S. at ----, 111 S.Ct. at 2340. "Rules of justiciability serve to make the judicial process a principled one[,]" and a departure from those rules would result in a decision in this case "lack[ing] in the clarity and force which ought to inform the exercise of judicial authority." *Id.*

## III. Conclusion

For the foregoing reasons, the Court dismisses this action as nonjusticiable. However, as the Court has not reached the merits of Plaintiffs' constitutional claims, this dismissal is without prejudice.

# UNITED STATES COURT OF APPEALS
# FOR THE THIRD CIRCUIT

No. 92-5339

THE PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation; CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey Corporation; REV. DAVID B. CUMMINGS,

*Appellants*

v.

JAMES FLORIO, GOVERNOR OF NEW JERSEY, in his official capacity; ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY, in his official capacity; MARILYN FLANZBAUM; ROMAN ANGEL; BETTY CARSON; OLGA L. VASQUEZ-CLOUGH; FELTON LINGO, SR .; REINHOLD W. SMYCZEK; CASEY TAM, all in their official capacities as members of THE DIVISION ON CIVIL RIGHTS; C. GREGORY STEWART, in his official capacity as executive of THE DIVISION ON CIVIL RIGHTS; JOHN DOE(S); JANE DOE(S), addresses unknown, etc.

*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 92-01641)
District Judge: Hon. William G. Bassler

Argued September 23, 1992
Before: HUTCHINSON, and ALITO, Circuit Judges, and FULLAM,* District Judge

(Opinion Filed: December 14, 1992)

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* Hon. John P. Fullam, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

## MEMORANDUM OPINION OF THE COURT

**ALITO, Circuit Judge:**

This is an appeal from an order denying the plaintiffs' application for a preliminary injunction. The application requested that the district court enjoin enforcement of certain provisions of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5 *et seq.*, and grant other relief. Because the plaintiffs did not demonstrate that they would suffer irreparable injury *pendente lite* if the preliminary injunction was not granted to prevent a change in the status quo, we affirm the decision of the district court.

### I.

The plaintiffs in this case are the Presbytery of New Jersey of the Orthodox Presbyterian Church, a New Jersey religious corporation; the Calvary Orthodox Presbyterian Church of Wildwood, a member church; and Reverend David B. Cummings, an ordained minister of the Presbytery and the pastor of one of its member churches. The Orthodox Presbyterian Church is a nationwide religious denomination with 19 churches and over 1000 members in New Jersey. The Presbytery is the governing body of the denomination. The Church teaches that homosexuality, bisexuality, and heterosexual sex outside of marriage are grievous sins. According to the plaintiffs' brief, the Church "has discriminated against" these practices, and the plaintiffs advocate "reasonable distinctions" based on their beliefs regarding these practices. Appellants' Brief at 6. The defendants are the governor of New Jersey, various state officials in charge of executing the laws of the state, and unnamed private individuals that the plaintiffs fear will attempt to enforce the LAD.

Prior to 1992, the LAD prohibited discrimination based on race, creed. color, and several other characteristics. N.J.S.A. 10:5-3 (West Supp. 1978). The LAD applied to hiring, labor organization membership, employment agency so-

licitation, public accommodation, real estate transactions, financing, and business transactions. N.J.S.A. 10:5-12(a), (b), (c), (f), (g), (h), (i), (k), and (1) (West Supp. 1979). The LAD also made it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e) (West 1976).[1]

In 1992, numerous provisions of the LAD were amended to cover discrimination based on "affectional or sexual orientation." *See* N.J.S.A. 10:5-3: 10:5-4; 10:5-6; 10:5-8(c) and j; 10:5-9.1; 10:5-10; 10:5-12(a), (b), (c), (f), (g), (h), (i), (k), (1), and (m); 10:5-27; 10:5-31: 10:5-32; 10:5-33; 10:5-34 (West Supp. 1992). This term was defined to mean "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, pressured or identified by others as having such an orientation." N.J.S.A. 10:5-5(ff) (West Supp. 1992).

A party wishing to obtain relief under the LAD may file a complaint with the Division on Civil Rights ("DCR") or may commence a suit in the Superior Court without filing an administrative complaint. N.J.S.A. 10:5-13 (West Supp. 1992). The LAD states that "[a]ny individual who has been discriminated against" in violation of the LAD and "any organization which represents or acts to further the interests of individuals who have been discriminated against" in violation of the LAD "shall have standing" to institute an enforcement action. N.J.S.A. 10:5-38 (West 1976). The DCR is entitled to intervene in any private enforcement action. *Id.*

Within several months after the enactment of the 1992 amendments to the LAD, the plaintiffs commenced this action. Their complaint argued that various provisions of the LAD violated rights protected by the First, Fifth, Ninth, and

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[1] A similar but more limited prohibition against incitement appears at N.J.S.A. § 10:5-12(n) (West Supp. 1979).

Fourteenth Amendments. Among other things, the plaintiffs sought a preliminary injunction enjoining the defendants from enforcing the 1992 amendments against the plaintiffs and their members.

In response, the Director of the DCR filed an affidavit setting out the interpretation that had been adopted by his office, with the advice of the Attorney General, regarding the scope of the LAD as applied to religious institutions. App. at 291. The affidavit specifically addressed the applicability of the provisions of the LAD prohibiting discrimination in places of public accommodation and employment. In addition, the affidavit contained more general statements regarding the application of the LAD to religious institutions. With respect to the LAD's provisions on public accommodation, the Director stated that churches and other places of religious worship were not considered "places of public accommodation" and that the LAD provisions governing places of public accommodation had not been and would not be applied to churches and other places of religious worship. App. at 294. The Director acknowledged that complaints against churches under these provisions had been filed with the DCR in the past, but he stated that all of them had been dismissed. With respect to employment, the Director asserted that "a church or other place or institution whose purposes (sic) is housing religious worship, practice or activities" is not "subject to the LAD when it reaches employment decisions based upon sincerely-held, First-Amendment protected, religious beliefs." App. at 295. The Director also made the following, more general statements:

> [I]t has been the consistent construction and interpretation of the LAD that, consonant with constitutional legal barriers respecting legitimate belief and free exercise protected by the First Amendment, the State was not authorized to regulate or control religious worship, belief, governance, practice or liturgical norms, even where ostensibly or colorably

> at odds with any of the LAD prohibited categories of discrimination. Hence, the Division, advised by the Attorney General, does not now, has not in the past and does not in the future intend to treat or subject to the LAD any place of religious worship. . . .
>
> Moreover, the Division has not and has no intention to engage in any determination or judgment as to what is or is not a "religious activity" of a church, or to determine what is or is not a "tenet" of religious faith. Within the First Amendment limits, all of plaintiffs' claimed religiously-based free exercises of faith are unthreatened by a reasoned construction of the LAD consistent with its meaning and law enforcement history. . . .
>
> For similar First Amendment concerns, the Division has not in the past prosecuted and has no intention to prosecute essentially exempt churches for sincerely held religious belief or practice, or speech consistent with such belief, or for a refusal to engage in certain speech or for following their religious tenets, all within only the limits of the First Amendment. Reasonably and constitutionally construed, the law plainly does not and just cannot apply within those limits.

App. at 294-296.

The district court denied the application for a preliminary injunction. The court first concluded that the plaintiffs had not shown likelihood of success on the merits. The court stated that the thrust of the LAD had to be gleaned from the entire Act. Citing the provisions of the LAD granting certain specific exemptions for religious institutions, the court stated that if the LAD is read as a whole, "there is a clear conclusion that this statute is not intended to apply to exercise of religion and religious houses of worship." The court continued: "Nothing in the statute in any way precludes the preaching of

the moral code of any particular religious organization . . . ." App. at 16.

The district court also held that the plaintiffs had not shown that they would suffer irreparable harm if preliminary relief was not granted. The district court relied on the Director's affidavit indicating that the DCR had "no intent to apply [the 1992 amendments] to the plaintiffs in the context of legitimate religious beliefs." App. at 18. The court noted the plaintiffs' argument that their First Amendment rights were being chilled, but the court stated that "the Division of Civil Rights has not in the past prosecuted and has no intention to prosecute, essentially, exempt religious organizations for sincerely held religious beliefs or practices or speech consistent with that belief or for a refusal to engage in certain speech or for following their religious [tenets]." App. at 19.

The plaintiffs then took this appeal. They argue that the following three provisions of the LAD violate their right to freedom of speech: N.J.S.A. 10:5-12(e), which makes it illegal "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so"; N.J.S.A. 10:5-12(l) and (n), which prohibit any person from refusing to do business with any other person based on discrimination prohibited by the LAD; and N.J.S.A. 10:5-12(j), which requires employers to post notices concerning the rights and responsibilities of persons affected by the LAD.

## II.

The standards governing preliminary injunctions are well established. In deciding whether to grant preliminary relief, a district court must consider "(1) whether the movant has demonstrated reasonable probability of eventual success in the litigation; (2) whether the movant has demonstrated that it will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the *status quo*; (3) the possibility of harm to other interested persons from the grant or denial of

the injunction, and (4) the public interest." *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806, 812-13 (3d Cir. 1989). The balancing of these factors is generally committed to the sound discretion of the district court. *Campbell Soup Co. v. Conagra. Inc.*, No. 91-5997, slip. op. at 11 (3d Cir. Oct. 13, 1992). The Supreme Court has held, however, that in cases raising First Amendment issues, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that ' the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86 (1964). We will evaluate the plaintiffs' arguments in light of these standards.

We turn first to the question of irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). "But the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989). Merely to establish standing, a plaintiff must show at least some threatened injury. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 392 (1988); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In order to obtain a preliminary injunction, "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing." *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3714 (1992). A plaintiff must make "a 'clear showing of *immediate* irreparable harm.' " *Campbell Soup Co., supra*, slip op. at 11 (quoting *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989)).

It is apparent that the plaintiffs in this case are not threatened with irreparable injury as the result of any imminent en-

forcement actions by the Division on Civil Rights. The specific statements made by the DCR regarding the interpretation and enforcement of the LAD against religious bodies were quoted above. While portions of the DCR's statements are less than perfectly clear, we believe that they are sufficient to dispel any immediate threat that it will-take enforcement action against the plaintiffs. "If [a] prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here." *Poe v. Ullman*, 367 U.S. 497, 507 (1961) (plurality opinion); *see also C.I.O. v. McAdory*, 325 U.S. 472, 475 (1945). An injunction will not be issued 'to restrain one from doing what he is not attempting and does not intend to do. " '*Campbell Soup Co., supra*, slip. Op. at 15 (quoting *Continental Group, Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)).

The plaintiffs' primary argument regarding irreparable harm is based, not on the threat of enforcement by the DCR, but on the threat of private lawsuits. The plaintiffs argue as follows: the LAD grants broad standing to private parties and groups and provides an incentive for suits by allowing unlimited compensatory and punitive damages and awards of attorney's fees; the LAD requires the DCR to notify all known aggrieved parties of their right to sue in court without filing an administrative complaint; some administrative complaints have been filed against churches in the past; "numerous law reform and activist organizations, such as the Lambda Legal Defense Fund and the Lesbian and Gay Bar Association, apparently are already involved in the defense of this lawsuit"; the church had been forced to defend a law suit brought by gay rights activists in California; and "[f]inally, the record contains ample evidence of current threats by persons claiming 'sexual orientation,' discrimination by religious organizations in New Jersey." Appellants' Br. at 39-41.

The state responds that no LAD charges have ever been brought against the plaintiffs; that the only discrimination

claim ever brought against the Church based on its views on homosexuality, a California suit filed some years ago, was ultimately unsuccessful; that the DCR's narrowing interpretation of the LAD as applicable to religious entities is entitled to judicial deference and "will effectively protect plaintiffs"; and that the DCR has a statutory right under N.J.S.A. 10:5-13 to intervene in any private suits brought against the plaintiffs. Appellees' Br. at 31. The state concludes its discussion of irreparable harm with the following observation:

> To the extent that [the plaintiffs] may engage in "[conduct not protected by the First Amendment] and do so in a way that violates the law, they will be subject to the same responsibilities as all others. Their religious affiliation may not be used as a cloak to insulate them absolutely from liability and to provide them with more protection than afforded by the Constitution.

*Id.*

Based on the record and the arguments made by the parties, we would find it difficult to gauge whether the plaintiffs face an imminent threat of irreparable harm resulting from a private lawsuit. The plaintiffs have not adduced any direct evidence that any private party is contemplating a suit against them, but private parties often do not issue advance public statements regarding their intention to file civil actions. We can also understand why the plaintiffs' fears are not allayed by the DCR's statutory right to intervene in any private lawsuit and by the DCR's nonbinding interpretation of the LAD.

We need not, however, determine whether any private suit against the plaintiffs is imminent because a preliminary injunction in this case would not shield the plaintiffs from such suits. A preliminary injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P.

65(d). As we wrote in *Savarese v. Agriss*, 883 F.2d 1194, 1209 (3d Cir. 1989):

> Generally, "persons who are not actual parties to the action or in privity with any of them may not be brought within the effect of a decree merely by naming them in the order." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2956 at 555-56 (1973) (footnote omitted). Furthermore, "[t]he only significant exception to this rule involves nonparties who have actual notice of an injunction and are guilty of aiding or abetting or acting in concert with a named defendant or his privy in violating the injunction. . . .Wright & Miller *supra* at § 2956 at 556-57 (footnote omitted).

In light of these restrictions, we see no way in which a preliminary injunction could effectively protect the plaintiffs from the sort of private suit under the LAD that they fear. *Cf. Salvation Army v. Dept. of Community Affairs*, 919 F.2d 183, 193 (3d Cir. 1990). Even if notice of the preliminary injunction were given to some private parties, they would not be bound unless they were also "in active concert or participation" with the defendants in this case. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) ("a nonparty with notice cannot be held in contempt until shown to be in concert or participation"). Moreover, as the plaintiffs themselves stress, New Jersey law confers standing to bring LAD actions on a broad array of persons and groups, and thus it is doubtful that notice of a preliminary injunction could be given to more than a small fraction of those with standing.

Under these circumstances, we do not believe that the plaintiffs have "demonstrated that [they] will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the *status quo*." *Ortho Pharmaceutical Corp., supra*, at 813. This is so because a preliminary injunction would be ineffective to prevent the change in the status quo that they fear, i.e., an LAD action filed by a private party.

For this reason, we affirm the order of the district court. The district court based its decision on two grounds: (1) that the plaintiffs were not likely to succeed on the merits and (2) that they had failed to demonstrate a threat of imminent irreparable harm. Our affirmance is based solely on the second of these grounds and our opinion expresses no view as to the merits of the underlying claim.

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TO THE CLERK OF THE COURT:

Please file the foregoing Memorandum Opinion.

/s/_____
Circuit Judge

# U.S. DISTRICT COURT,
# DISTRICT OF NEW JERSEY

THE PRESBYTERY, et. al. v. GOVERNOR FLORIO, et. al.,
No. 92-01641, June 19, 1992

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Thomas S. Neuberger, James J. Knicely, and Thomas C. Crumplar, for plaintiffs.

William H. Lorentz and Charles Cohen, Deputy Attorneys General of New Jersey, for defendants.

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*Full Text of Oral Opinion*

WILLIAM G. BASSLER, District Judge: — The opinion of the Court this afternoon addresses only the application for the temporary restraining order and preliminary injunction. It does not address the motion to dismiss nor the other issues raised in the compliant as to the amendments to the law against discrimination.

I invite counsel, if they wish, to give me—plaintiff to give me if—I'm not sure that I need it, but I'm simply inviting plaintiff's counsel if they wish to give me any additional briefs on the issue of abstension or any other issue.

MR. NEUBERGER: Would a letter memo be sufficient?

THE COURT: Sure, fine.

MR. NEUBERGER: Thank you, your Honor.

THE COURT: I need to put a date on it, though. That would be by Friday, June 26: response from the Attorney General by Monday, July 6th.

A District Court's decision to issue a temporary restraining order or preliminary injunction is committed to its sound discretion and must be affirmed unless the Court has abused its discretion, committed an obvious error in applying law or making a serious mistake in considering the proof.

The record should reflect that in reaching the decision this afternoon that I have taken into consideration the criteria set forth in *United Telegraph Workers AFLCIO -v- Western Union Corporation,* 771 Fed. 2nd, 699, 703 [120 LRRM 2403], Third Circuit, ~~1~~1985, quoting *United States versus Price*, 1982, and *Gerber versus Seamans*, 332 Fed. Supplement 1187, Southern District of New York, 1971.

In order for the court to issue a temporary retraining order or preliminary injunction, the moving party bears the burden of establishing the following elements: First, the movant is likely to succeed on the merits of his or her claim.

Two, if such relief is not granted, the moving party will suffer irreparable, irreparable harm.

Three, the prejudice suffered by the moving party, if the requested relief does not issue, exceeds the prejudice suffered by the defendant if the relief is granted.

And fourth, the public will not be harmed by the issuance of the requested relief: *United States versus Price* at page 211.

It is the conclusion of the court, after carefully considering all of the moving papers and oral argument—which by the way since I've been on the bench it's been one of the finest arguments that the Court has had the pleasure of entertaining

and I respect counsel for that—it is the conclusion of the court that the plaintiffs have failed to demonstrate the existence of the above elements and, therefore, the request of the plaintiffs for a temporary restraining order and/or preliminary injunction is denied.

The following are my reasons for the denial: First, I find that the plaintiffs have failed to demonstrate a likelihood of success on the merits. According to the representations made by the Office of the Attorney General in its brief in opposition to application for the temporary restraining order, and /or preliminary injunction, and the representations made here in this Court today, there is no real threat of suit against the plaintiffs for making any of the religious based decisions concerning conduct, practice or beliefs in an employment context or otherwise. See the Attorney General's brief in opposition at page 22 at page 30.

Moreover, for the purpose of not offending legitimate First Amendment concerns, the New Jersey law against discrimination specifically exempt religious institutions in one way or another. See the affidavit of Gregory Stewart, Director of the New Jersey Division of Civil Rights at paragraphs 10 to 12. The threat that the plaintiffs perceive, in my opinion, is based more on imagination that on fact, I say that because it is this Court's reading of the law against discrimination that the purpose of the statute is to accommodate the legislature's decision to protect certain protected categories of individuals from discrimination and at the same time, to accommodate the and respect the religious tenets of religious organizations. The plaintiff has correctly itemized areas of the statute where the language is not felicitous, but the statute has to be read in toto. The thrust of the statute has to be gleaned from the entire provision, all of the provisions, and to segregate certain provisions from others is not how we go about constructing statutes for the purpose of issuing temporary restraining orders. The concern that the civil rights or the law against discrimination reaches religious exercises has no

base in this statute itself or in the history of the statute. Specifically, under definitions 10:5-5, E.L. there is a provision as follows: Nothing herein contained shall be construed to include or to apply to any institution, bona fide club or place of accommodation which is in its nature distinctly private. Nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution. Statute goes on to address a concern of the plaintiffs, a concern which this Court respects. The statute states that the right of a natural parent or one in loco parentis to direct the education and up bringing of a child under his control is hereby affirmed. It goes on to say, nor shall anything herein contained by construed to bar any private, secondary or post-secondary school from using in good faith criteria other than race , creed, color, natural origin or ancestry in the admission of students.

Another provision of the statute read, 10:5-5 N., nothing herein contained shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization in the sale, lease, or rental of real property from limiting admission to or giving preference to persons of the same religion or denomination, or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

Nothing here indicates that the Legislature is limiting the exemption to members of the same religious professional. The concern that the Legislature intended to include use when it excluded sale, lease, or rental of real property is beyond this Court's comprehension.

It is obvious from the different language that is used that the Legislature is struggling with the difficulty of phrasing an exclusion to permit religious organizations to hire, employ, and utilize property in a way that is in conformity with their

own religious tenets and at the same time accommodate what the Court has to accept as a public policy statement reflected in the decision of the Legislature and a bill signed by the governor, to expand the area of those who are protected by the act. Needless to say, the effort to make that accommodation in writing is not an easy one, and certain sections can be perhaps, picked out at random to say that that accommodation hasn't been reflected in the statute. But it seems to me that the correct way of interpreting any statute is to read it as a whole. And if we do that, there is a clear conclusion that this statute is not intended to apply to exercise of religion and religious houses of worship. Nothing in the statute in any way precludes the preaching of the moral code of any particular religious organization and nothing pre—in fact, not only does it not preclude a religious organization from hiring or firing based upon its own membership, but it goes, in my opinion, goes beyond and specifically permits a religious organization to make employment decisions based upon the tenets of its own religion regardless of whether or not the effected person is a member of that religious profession. Section 10-12 A. states, provided further that it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniformed qualification for employment or for a religious association or organization to utilize religious affiliation as a uniformed qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee.

In order to demonstrate a threat to the plaintiff, the plaintiff has construed this section in what I consider to be an artificial construction. Furthermore, the fact that a religious organization can make an employment decision based upon tenets of its religion is further supported by the Senate, State, Government, Federal Interstate relations and Veterans Affairs Committee statement appearing at page 180 of the pocket

parts of N.J.S.A. where it states-this is the 1977 amendment, amending the law against discrimination with respect to redefining the definition of employer. It states, quote, it also makes it lawful for a religious association or organization to use, quote, tenets of its religion, end quote, in, quote, establishing and utilizing criteria, end quote, for hiring an employee. Any other basis for selection is unlawful. This is not to say that the plaintiff's analysis of other provisions of the statute don't raise questions. But on the other hand, the raising of questions is not sufficient in itself to justify the issuance of a temporary restraining order.

In my opinion, it is not likely that the plaintiffs will succeed on their challenge to the 1992 amendment to the New Jersey law against discrimination as written. To date, it hasn't yet been applied.

Secondly, the plaintiffs are unable to show that they will suffer irreparable harm if the requested relief is denied. I find support for that conclusion by analyzing the Office of the Attorney General's representation regarding both the past and prospective application to religious institutions of the law against discrimination, as well as the 1992 amendment, as well as other case law interpreting various provisions, case law, both Federal and state interpreting provisions of this Act.

As the Attorney General's Office sets forth in its brief in opposition, there is no intent to apply this amendment to the plaintiffs in the context of legitimate religious beliefs. See the affidavit of Gregory Stewart, Director of the New Jersey Division on Civil Rights, paragraphs eight, nine and 13.

It is significant to this Court that the New Jersey Division of Civil Rights is in the process of considering the adoption of regulations to aid in the enforcement and the understanding of the applicability of the recent amendment to the law against discrimination. See opposition brief at page nine, Stewart affidavit at paragraph four.

Thus, at the 1992 amendment has not yet to be delineated insofar as its scope and limitations, there is nothing I have in the record that would lead me to the conclusion that it would be applied to the plaintiffs in a way so as irreparably injure them.

The record should also reflect the fact that New Jersey Statute Annotated 52.14 B-4 provides any citizen the opportunity to petition the Division of Civil Rights for clarification for guidance with respect to an interpretation of any portion of the law against discrimination.

In addition, New Jersey Statutes Annotated 52:14 B-8 provides that any citizen who questions or is concerned about the applicability of a particular statutory or regulatory scheme may file with the agency a request for a declaratory ruling. The plaintiffs have not availed themselves of any of these opportunities.

Insofar as the plaintiff's First Amendment argument is concerned, they submit that portions of the law against discrimination both as written and as applied, chill their protected First Amendment rights. But again, the Division of Civil Rights has not in the past prosecuted and has no intention to prosecute, essentially, exempt religious organizations for sincerely held religious beliefs or practices or speech consistent with that belief or for a refusal to engage in certain speech consistent with that belief or for a refusal to engage in certain speech or following their religious tenets. See the Stewart affidavit at paragraph 13.

I find that there is no real threat of irreparable injury if the requested relief at this time is denied. In fact, I have to say bluntly I am unsure as to the existence of any injury at all, either real or threatened.

Thus, I am unpersuaded that the plaintiff's allegations of chilling are sufficient to constitute irreparable injury. It is not sufficient simply to make the allegation: that present before this Court there is no suit pending against the plaintiffs; there

is no threat of any suit pending against the plaintiffs. There was a suit in California which is over 12 years old, and that hardly leads to a threat of imminent injury.

In addition to the staleness of that suit, a suit by the way that the plaintiffs won, we have in this case the public declaration of the Attorney General that the concerns expressed in the plaintiff's pleadings, concerns that certainly this Court take seriously, that those concerns are not reached by the scope of this Act.

The third and fourth elements for a temporary restraining order and/or preliminary injunction, require me to balance the burdens to each of the parties and consider the public's interest. I have discussed at length the lack of injury, real or threatened, that will befall the plaintiffs in the absence of injunction relief. And I don't need to repeat this to illustrate the fact that the plaintiffs will not be unduly burdened or prejudiced by my refusal to grant this requested relief. On the other hand, it seems to me that a Federal court has to take into consideration that the Legislature of the State of New Jersey, along with the Governor, has implemented a statute, presumptively valid, which attempts to address a perceived problem of the Legislature in protecting persons of a minority sexual orientation, and certainly that statement of public policy by the Legislature needs to be given some weight in evaluating whether or not this Court enacts an injunction against the Governor, the Attorney General and Division of Civil Rights. It seems to me that if I were to stay the government's exercise of the policy power of the State for the, based upon what I think is very strained interpretation of the statute, I would not be giving deference to the legislature's efforts to establish the public's interest in protecting persons of a minority sexual orientation. An injunction could create a harm if I were to stay the government's exercise of police power, and I need to consider that the language in new Jersey Statutes Annotated 10:5-2 which states that the exercise of the police power of the State for the protection of the public safety,

health and morals is to promote the general welfare and fulfillment of the provisions of the constitution of this state guaranteeing civil rights.

Therefore, in conclusion, Court finds as a finds as a fact and concludes as a matter of law, that there is no threat to the plaintiffs of enforcement of this Act against the practices which they have itemized in their complaint.

Secondly, there is no actual or well founded fear that the law against discrimination will be enforced as envisioned by the plaintiffs.

Third, the pleadings lack sufficient factual specificity to justify the imposition of a temporary restraining order or preliminary injunction.

Fourth, the plaintiffs have available remedy to allay their perceived threat by requested a ruling from the Division of Civil Rights or by filing an action under the Uniform Declaratory Judgment Act.

Fifth, the language of the statute and prior case law evidenced no intention of the Legislature to extend the law against discrimination to religious exercises whether in church or in the synagogue, or a park or auditorium, or in any way to inhibit public statements disapproving of certain sexual morays.

As to the concern with respect to employment practices, there is, in my opinion, no basis at all for the concerns expressed by the plaintiff in view of the various exemptions that I have already itemized. And in view of the Attorney General's unequivocal statement that there is no intend on the part of the Division or the Statement of New Jersey to apply this Act in a way that the plaintiffs are concerned about, and that seems to me and I'll repeat it again, crystal clear from the statement of the Senate itself, that it is lawful for a religious association or organization in this state to use the tenets of its religion in establishing and utilizing criteria for hiring an employee, that the plaintiffs are concerned that they might not stay the hand of some private individual, is simply not suffi-

cient grounds for the imposition of an injunction against the governor and the Attorney General and the Civil Rights division. Absent a demonstration that the plaintiffs are likely to risk either a public or private action to enforce the law against discrimination, the application for temporary restraining order and preliminary injunction is denied.

MR. NEUBERGER: Thank you.

THE COURT: Counsel thank you very much.

MR. LORENTZ: Thank you, your Honor.

(Whereupon the matter was concluded.)

## SUR PETITION FOR HEARING

No. 93-5559, Dec. 13, 1994

Before SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, MCKEE, SAROKIN and ROSENN*, Circuit Judges.

The petition for rehearing filed by appellees in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.*

* Hon. Max Rosen, United States Circuit Judge was limited to voting for panel rehearing.

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

No. 95-5706

PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation; CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey corporation; REV. DAVID B. CUMMINGS,
*Appellants,*

v.

CHRISTINE TODD WHITMAN,* GOVERNOR OF NEW JERSEY, in her official capacity; PETER VERNIERO,* ATTORNEY GENERAL OF NEW JERSEY, in his official capacity; MARILYN FLAZBAUM; ROMAN ANGEL; BETTY CARSON; OLGA L. VAZQUEZ-CLOUGH; FELTON LINGO, SR.; REINHOLD W. SMYCZEK; CASEY TAM, all in their official capacities as members of THE DIVISION ON CIVIL RIGHTS; C. GREGORY STEWART, in his official capacity as executive of the DIVISION ON CIVIL RIGHTS; JOHN DOE (S), JANE DOE (S), addresses unknown, the last two being fictitious names, the real names of said defendants being presently unknown or known only in part to plaintiffs, said fictitious names being intended to designate organizations, persons and others acting in concert with any of the defendants who engage in, are engaged in, or who intend to engage in, the conduct of defendants complained of herein, or who would have the right to file or seek enforcement of administrative, equitable or legal complaints or suits or to assert any other legal claims or remedies or enforcement thereof against the plaintiffs under the New Jersey Law Against Discrimination, as amended by the 1992 affectional and sexual orientation amendments, and all others similarly situated.

(*Parties substituted pursuant to Fed R. App. P. 43(c) (1).)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Action No. 92-01641)

No. 95-5706

Present: Becker, Nygaard and Lewis, *Circuit Judges*

**JUDGMENT**

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 28, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 14, 1995, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Chief Deputy Clerk

Dated: October 25, 1996

## U.S. CONSTITUTION

### Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## AMENDMENT XIV

*Section 1.* All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983**

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## N. J. STAT. ANN.

**10:5-12. Unlawful employment practice or unlawful discrimination**

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United Stated or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discrimination against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; provided further that it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an

employee; provided further, that it shall not be an unlawful employment practice to require the retirement of any employee who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans, of the employer of that employee which equals in the aggregate at least $27,000.00; and provided further that an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.

For the purposes of this subsection, a "bona fide executive" is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. A "high policy-making position is a position in which a person plays a significant role in developing policy and in recommending the implementation thereof.

b. For a labor organization, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex of any individual, or because of the liability for service in the Armed Forces of the United States or nationality of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members, against any applicant for, or individual included in, any apprentice or other training program or against any employer or any individual employed by an employer; provided, however, that nothing herein contained shall be construed to bar a labor organization from excluding from its apprentice or other training programs any person on the basis or sex in those certain circumstances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular apprentice or other training program.

c. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form or application for employment, or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex or liability of any applicant for employment for service in the Armed Forces of the United States, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of any right protected by this act.

e. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

f. For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation

or nationality of such person, or that the patronage or custom thereat of any person of any particular race creed, color, national origin, ancestry, marital status, sex affectional or sexual orientation or nationality is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further, that the foregoing limitation shall not apply to any restaurant as defined in R.S.33:1-1 or place where alcoholic beverages are served.

g. For the owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:

(1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, familial status or nationality of such person or group of persons;

(2) To discriminate against any person or group of persons because of the race, creed, color, national origin marital status, sex or, affectional or sexual orientation o. familial status of such person or group of persons in the terms, conditions or privileges of the sale, rental or lease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post or mail, or cause to be printed published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment or sublease of any real property or part or portion thereof, or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, familial status or nationality, or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied by individuals of one sex to any individual of the exclusively for and opposite sex on the basis of sex.

h. For any person, including but not limited to, any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent, assign, lease or sublease, or offer for sale, rental, lease, assignment, or sublease any real property or part or portion thereof to any person or group of persons or to refuse to negotiate for the sale, rental, lease, assignment, or sublease of any real property or part or portion thereof to any person or group of persons because of the race, creed, color, national origin, marital status, familial status, sex, affectional or sexual orientation or nationality of such person or group of persons, or to represent that any real property or portion thereof is not available for inspection, sale, rental, lease, assignment, or sublease when in fact it is so available, or otherwise to deny or withhold any real property or any part or portion of facilities thereof to or from any person or group of persons because of the race, creed, color, national origin ancestry, marital status, familial status, sex, affectional or sexual orientation or nationality of such person or group of persons;

(2) To discriminate against any person because of his race, creed, color, national origin, ancestry, marital status, familial status, sex or affectional or sexual orientation in the terms, conditions or privileges of the sale, rental, lease, assignment or sublease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post, or mail or cause to be printed, published, circulated, issued, displayed posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental lease, assignment, or sublease of any real property or part or portion thereof or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, familial status, sex, affectional or sexual orientation or nationality or any intent to

make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection h., shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied exclusively by individuals of one sex to any individual of the opposite sex on the basis of sex.

i. For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution to whom application is made for any loan or extension of credit including but not limited to an application for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof or any agent or employee thereof:

(1) To discriminate against any person or group of person because of the race, creed, color, national origin ancestry, marital status, sex, affectional or sexual orientation or nationality of such person or group of persons or of the prospective occupants or tenants of such real property or part or portion thereof, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of any such loan, extension of credit or financial assistance or in the extension of services in connection therewith; or

(2) To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, mari-

tal status, sex, affectional or sexual orientation or nationality or any intent to make any such limitation, specification or discrimination; unless otherwise required by law or regulation to retain or use such information; or

(3) To discriminate on the basis of familial status in any manner described in paragraph (1) or (2) of this subsection with respect to any real property.

j. For any person whose activities are included within the scope of this act to refuse to post or display such notices concerning the rights or responsibilities or persons affected by this act as the Attorney General may by regulation require.

k. For any real estate broker, real estate salesman salesperson or employee or agent thereof or any other individual, corporation, partnership, or organization for the purpose of inducing a transaction for the sale or rental of real property from which transaction such person or any of its members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, marital status, familial status, sex, affectional or sexual orientation or nationality of the owners or occupants in the block neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including, but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

*l.* For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States or nationality of such other person or of such other person's spouse, partners, members stock-

holders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. This shall not prohibit refusals or other actions (1) pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or (2) made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

m. For any person to:

(1) Grant or accept any letter of credit or other document which evidences the transfer of funds or credit, or enter into any contract for the exchange of goods or services, where the letter of credit, contract, or other document contains any provisions requiring any person to discriminate against or to certify that he, she or it has not dealt with any other person on the basis of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

(2) Refuse to grant or accept any letter of credit, or other document which evidences the transfer of funds or credit, or refuse to enter unto any contract for the exchange of goods or services, on the ground that it does not contain such a discriminatory provision or certification.

The provisions of this subsection shall not apply to any letter of credit, contract, or other document which contains any provision pertaining to employee-employer collective bargaining, a labor dispute or an unfair labor practice. or made in connection with the protest of unlawful discrimination or an unlawful employment practice, if the other provisions of such letter of credit, contract, or other document do not otherwise violate the provisions of this subsection.

n. For any person to aid, abet, incite, compel, coerce or induce the doing of any act forbidden by subsections *l.* and m. of section 11 of P.L.1945, c. 169 (C. 10:5-12), or to attempt, or to conspire to do so. Such prohibited conduct shall include, but not be limited to:

(1) Buying from, selling to, leaning from or to, licensing, contracting with, trading with, providing goods, services, or information to, or otherwise doing business with any person because that person does, or agrees or attempts to do, any such act or any act prohibited by this subsection n.; or

(2) Boycotting, commercially blacklisting or refusing to buy from, sell to, lease from or to, license, contract with, provide goods, services or information to, or otherwise do business with any person because that person has not done or refuses to do any such act or any act prohibited by this subsection n.; provided that this subsection n. shall not prohibit refusals or other actions either pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

Amended by L.1992, c. 146, § 9. eff. Nov. 20, 1992.

# NOTICE

A-161

# New Jersey Law Prohibits Discrimination Based on Affectional or Sexual Orientation

Under the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, it is unlawful to discriminate because of Race, Creed, Color, National Origin, Nationality, Ancestry, Age, Sex, **AFFECTIONAL OR SEXUAL ORIENTATION,** Marital Status, Atypical Hereditary Cellular or Blood Trait, Liability for Service in the Armed Forces of the United States or Mental or Physical Handicap.

- **EMPLOYMENT** — A job applicant or employee cannot be treated differently because of his or her actual or perceived affectional or sexual orientation.
- **HOUSING** — A person cannot be denied the opportunity to obtain publicly assisted housing and/or other real property because of his or her actual or perceived affectional or sexual orientation.
- **PUBLIC ACCOMMODATION** — A person cannot be refused or denied any of the accommodations, advantages, facilities or privileges of a place of public accommodation because of his or her actual or perceived affectional or sexual orientation.
- **CREDIT** — A person may not be denied a loan, extension of credit or financial assistance because of his or her actual or perceived affectional or sexual orientation.
- **BUSINESS TRANSACTIONS** — A person cannot be refused the opportunity to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of his or her actual or perceived affectional or sexual orientation.

Affectional or Sexual Orientation is defined as male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

**Heterosexuality:** means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the other gender.

**Homosexuality:** means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the same gender.

**Bisexuality:** means affectional, emotional or physical attraction or behavior which is directed towards persons of either gender.

The law does not, however, require the imposition of affirmative action plans or quotas as specific relief from an unlawful employment practice or unlawful discrimination.

## *Violations should be reported to the nearest office*

- 31 Clinton Street
  P.O. Box 46001
  Newark, New Jersey 07102
  (201) 648-2700
- Camden State Office Bldg.
  101 Haddon Avenue
  Camden, New Jersey 08103
  (609) 757-2850
- 1548 Atlantic Avenue
  Atlantic City, New Jersey 08401
  (609) 441-3100
- 370 Broadway
  Paterson, New Jersey 07501
  (201) 977-4500
- 383 West State Street
  CN 090
  Trenton, New Jersey 08625
  (609) 292-4605

**LAPS** New Jersey Department of Law & Public Safety
Division on Civil Rights

**CIVIL RIGHTS**

## EXCERPTS FROM PLAINTIFFS' FIRST AMENDED COMPLAINT
[EMPHASIS ADDED BELOW IN BOLD]

. . .

5. The Presbytery brings this action **on behalf of itself as an organization, and on behalf of the churches, ministers and all the individual members of congregations** who are constituent parts of the Presbytery. . . .

. . .

11. Additionally, **the members of the Presbytery (its churches, ministers and individual members of its congregations) are similarly and vicariously injured by the statute in question** and thus the Presbytery joins in this suit **on its own behalf and also on behalf of its constituent churches, ministers and 2113 members of its constituent churches and congregations**. . . .

12. Since plaintiffs have themselves suffered direct injury from the challenged statute, **prudential considerations permit them to advance the interests of their 2113 members and 19 churches.** Because this is a free speech case, plaintiffs also can assert the rights of their members because the challenged statute is overbroad on its face. Hereinafter, references to plaintiffs include the named plaintiffs and also by incorporation their constituent **churches, ministers and the individual members** of their congregations.

. . .

46. The amendments seek to control public and private speech and opinion on the debate on the morality of homosexuality, bisexuality and other "affectional or sexual orientation" classifications which are protected from private discrimination. **The statute imposes stiff penalties against those who express, through published or spoken word or actions, their belief that acts of homosexuality, bisexuality and heterosexual sex outside of marriage are undesirable,**

**sinful, immoral, learned behaviors, and not immutable traits.** In addition, **everyone, including plaintiffs, is prohibited from holding and/or exercising their sincerely held religious beliefs** and are forced to post signs directly at variance with their religious convictions.

47. The purpose and intent of the aforementioned provisions of the amendments is specifically **to inhibit, infringe upon, and restrict the First Amendment activities of plaintiffs and others** on the issue of "affectional and sexual orientation."

. . .

51. Plaintiff Cummings, **other pastors and members of their congregations,** whether they are or are not employers or employees, do speak out about homosexuality, bisexuality and heterosexual sex outside of marriage, make reasonable distinctions based on such practices, lobby against them, and circulate literature condemning them. They encourage, aid and abet discrimination and reasonable distinctions against homosexuals, bisexuals and heterosexuals engaging in sex outside of marriage. All these actions subject plaintiffs to sanctions under N.J.S.A. 10:5-12e.

. . .

**COUNT I. (FREE SPEECH)**

. . .

107. The statute is not narrowly tailored, instead it is overbroad and vague as written, **when it prohibits all speech which indirectly can promote discrimination against homosexuals, bisexuals and heterosexuals practicing sex outside of marriage.**

. . .

## COUNT VI. (VAGUENESS AND OVERBREADTH)

. . .

139. Additionally, and in the alternative, the statute is substantially overbroad on its face. The statute reaches and restricts a substantial amount of constitutionally protected conduct, and **there is a very realistic danger that the statute will significantly compromise First Amendment freedoms of persons not before the Court.**

. . .

WHEREFORE, plaintiffs pray that this Court:

. . .

(b) **enter a declaratory judgment** declaring the statute as written and as applied to be a violation of plaintiffs' constitutional rights and **the constitutional rights of others who are similarly situated,**

(c) issue a temporary restraining order, a preliminary and permanent injunction enjoining the defendants from enforcing the amendments to the statute **against plaintiffs and their members, and against all others similarly situated, who seek . . . to engage in Free Speech, . . .**

**EXCERPTS FROM BRIEFS [in No. 95-5706]**
**BRIEF FOR APPELLANTS**
[EMPHASIS ADDED BELOW IN BOLD]

. . .

## STATEMENT OF FACTS

On an unrebutted summary judgment record, plaintiff Cummings has proven that the State intends to enforce the challenged provisions "against the members of the church for their public activities [and] . . . against [himself] for his activities outside the Church." *Presbytery III*, 40 F.3d at 1461, see 1462 n. 7, 1464, 1467 and n.11.[footnote omitted] **Likewise, it is unrebutted that Cummings and others seek to engage in "political and religious" speech,** *Presbytery IV*, at 42, 43, 69, or "oral advocacy" (to use this Circuit's words, *Presbytery III*, 40 F.3d at 1469), by circulating handbills or tracts throughout New Jersey which speak out against and condemn homosexuality (A208 ¶26; 217 ¶49; 218 ¶51), by lobbying against it (A218 ¶51), and by promoting "by word" the fact that discrimination is desirable against "heterosexuals engaging in sex outside of marriage [or in] fornication." A215 ¶43; 217 ¶49; 218 ¶51. The record also is unrebutted that plaintiffs even "coerce," "compel," or "incite" discrimination in violation of the LAD. For example, they teach that church members who do not discriminate against adulterers or homosexuals must be made to recant such conduct publicly. A180 ¶6. Condoning such activity is "heresy" which must be corrected. A192 ¶4. Charges may also be brought against any member of the denomination who obeys civil proscriptions that violate scriptural mandates and discipline will be administered (A163 ¶7), such as excommunication. A168 ¶13; 208 ¶26; 166 ¶3. *See Presbytery IV*, at 7-8.

Indeed, it is the settled law of the case before this Court that the factual record is uncontroverted as to plaintiff Cummings' expression on the issue of homosexuality (*Presbytery III*, 40 F.3d at 1465, 1460, A141, 139):

> Cummings has in the past, currently does and in the future will engage in conduct both in his professional and personal life that could run afoul of the statute. . . . Cummings, as an individual, plans to engage in conduct that has a potential for violating the LAD's ban on *incitement* of prohibited discrimination against male or female homosexuals in employment, commerce and places of public accommodation by boycott or otherwise. *Id.* at 1465-66 (footnote omitted)(emphasis added).[footnote omitted]

. . .

## ARGUMENT

### I. SECTIONS 10:5-12(C) AND (F), WHICH ARE INCORPORARTED UNDER THE PROSCRIPTIONS OF SECTIONS (e) AND (n), ARE IMPERMISSIBLY OVERBROAD AND VAGUE.

. . .

**A. Plaintiffs Have Overbreadth Standing To Challenge the Offending LAD Provisions.** Plaintiffs alleged that -

> the statute is substantially overbroad on its face. The statute reaches and restricts a substantial amount of constitutionally protected conduct, and **there is a very realistic danger that the statute will significantly compromise First Amendment freedoms of persons not before the Court.** A240, para. 139, see A232 para. 107, A216, para. 47.

The challenged LAD provisions clearly regulate pure speech and speech-related conduct. Subsections (e) and (n), through their incorporation of subsections (c) and (f), **specifically prohibit on their face any person** [footnote omitted] from "inciting," "compelling" or "coercing," [footnote omitted] "directly or indirectly," forbidden things such as "printing" or "circulating" "statements" or "publications" that discriminate based on sexual orientation, or violating some other unspeci-

fied "limitation" or "specification" of the law with reference to sexual orientation, or "any intent" to do so. This latter phrase, from clause (c), is open ended and involves thought control. **And the record is *undisputed* and *unrebutted* that Plaintiff Cummings, the 2113 members of the denomination, and obviously other "persons" found in New Jersey, --- *whether or not* they are employers or providers of public accommodations, --- are nevertheless covered by the LAD as individuals under subsections (e) and (n) and do in fact have such "intent" or engage in protected speech activities described above disapproving of homosexuality, bisexuality and heterosexual sex outside of marriage.** See pp. 12-14 above.

Because the statute substantially regulates speech, **Cummings and the other Church plaintiffs have standing under applicable First Amendment principles to challenge the facial validity of the LAD and to seek to protect not only themselves, but others "not before the Court".** This is so because when there is a danger that **a regulation might "chill the expressive activity of others not before the Court, . . . the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where . . . the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected."** *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 127-28 (1992)(citations omitted). [footnote omitted] **This would include other members of the Church as well as any person in New Jersey** since section 10:5-12(e) by its terms applies to "any person," not just employers or providers of public accommodations.

. . .

**B. The Facial Invalidity of the Challenged Provisions of the LAD Is Apparent On Overbreadth Grounds.**

. . .

Proceeding, then, to the bans on the publication of ideas contained in LAD subsections (c), (e), (f), (l), (m) and (n), **the plain language of the LAD extends** not only to discriminatory conduct in a workplace or a particular place of accommodation, but to speech ***in public places anywhere in New Jersey*, at *any time*, by *any person*, or "any" such "intent." These provisions on their face literally proscribe *every* person in New Jersey from communicating ideas adverse to certain "sexual orientations." The subsection (e) ban reaches "*any* person," whether an "employee, employer *or not*," and whether a provider of accommodations or not**

. . . .

. . .

## II. THE CHALLENGED PORTIONS OF THE LAD CONSTITUTE IMPERMISSIBLE CONTENT AND VIEWPOINT DISCRIMINATION.

. . .

**4. LAD Viewpoint Discrimination.** Like the St. Paul ordinance in *R.A.V.*, the LAD fosters facial viewpoint discrimination as well. *R.A.V.* 505 U.S. at 391-92. **Here, those engaging in or inciting the "printing" or "circulating" of "statements" or "publications" containing odious injunctions against homosexual conduct or heterosexual sex outside marriage are threatened with severe civil penalties and liabilities, while those who similarly espouse other social, philosophical or psychological viewpoints** favoring homosexual or promiscuous conduct are not only permitted, but in effect encouraged to promote such conduct on an unequal playing field in the marketplace of ideas.

**REPLY BRIEF FOR APPELLANTS [in No. 95-5706]**

[EMPHASIS ADDED BELOW IN BOLD]

. . .

**I. INTRODUCTION.**

. . .

The undisputed factual record before this Court is that **plaintiff Cummings *and others* under the duress and coercion of the LAD nevertheless engage in "political and religious" speech,** *Presbytery IV*, at 42, 43, 69, or "oral advocacy" relating to scriptural mandates on the subject of sexual orientation. *Presbytery III*, 40 F. 3d at 1469. . . .

. . .

. . . The hurriedly drafted, patchwork 1992 LAD amendments **unduly burden free discourse about these issues and handicap rational political, philosophical or religious discussion and advocacy in an otherwise unfettered "marketplace of ideas."** *McIntyre v. Ohio Elections Comm'n*, 131 L. Ed. 2d 426, 436 (1995). Truth only prevails in such an unobstructed "market place of ideas." *See* Tribe, *American Constitutional Law*, 2nd ed. (1988), at 785-86; *see also, Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J.) ("[T]he remedy to be applied is more speech, not enforced silence".) [footnote omitted] Consequently, this case presents an age-old struggle to preserve open debate and discussion as the way to truth. *See* Karl Popper, *The Open Society and Its Enemies* (1966).

**II. SECTION 10:5-12(j) OF THE LAD CONSTITUTES FORCED SPEECH IN VIOLATION OF FREEDOM OF SPEECH AND CONSCIENCE.**

. . .

. . . the Exhibit "B" poster is **an "official" poster which Cummings and others similarly situated would otherwise**

**be required to post** in connection with employment, housing or public accommodations matters.

. . .

**IV. SECTIONS 10:5-12(c) AND (f), WHICH ARE INCORPORATED UNDER THE PROSCRIPTIONS OF SECTIONS (e) AND (n), ARE IMPERMISSIBLY OVERBROAD AND VAGUE.**

. . .

. . . Thus, notwithstanding the State's fine distinctions, by virtue of ***simple advocacy*, plaintiff Cummings and others like him are at substantial risk from the foregoing overbroad provisions of the LAD.** [footnote omitted]

. . .

**V. THE CHALLENGED PORTIONS OF THE LAD CONSTITUTE IMPERMISSIBLE CONTENT AND VIEWPOINT DISCRIMINATION.**

. . . On the other hand, **the speech of plaintiff Cummings and others sharing his viewpoint** urging obedience to scriptural mandates is **unduly burdened** by such threats and penalties. . . .

(2)

Supreme Court, U.S.
FILED
FEB 27 1997
OFFICE OF THE CLERK

No. 96-1156

In The

# Supreme Court of the United States

October Term, 1996

PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey corporation; CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey corporation; REV. DAVID B. CUMMINGS,

*Petitioners,*

vs.

CHRISTINE TODD WHITMAN, GOVERNOR OF NEW JERSEY, in her official capacity; et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE NAMED NEW JERSEY RESPONDENTS

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## STATEMENT OF THE CASE

Pursuant to the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et seq.*, which was originally enacted in 1945, members of legislatively designated classes are afforded civil rights protection, mostly in the areas of employment, housing and access to places of public accommodation. During the more than 50 years since this statute became law, it has been amended to reflect changing public policy by expanding the scope of its protections. By 1991 N.J. Laws 519, the New Jersey Legislature amended the LAD to include "affectional or sexual orientation" among these protected categories.[1] The amendment did not substantively change the LAD; it simply added this category throughout the statute wherever the existing classes are listed. The law was signed by then-Governor James Florio and became effective on January 19, 1992.

In April 1992, the original three plaintiffs – Reverend David B. Cummings, the Presbytery of New Jersey of the Orthodox Presbyterian Church, and Calvary Orthodox Presbyterian Church of Wildwood – brought this action in the United States District Court for New Jersey ostensibly to oppose the amendments, but in fact challenging the constitutionality of particular sections of the law, all of which pertain not only to affectional and sexual orientation but to all protected classes. Specifically the complaint

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[1] "Affectional or sexual orientation" is defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *N.J.S.A.* 10:5-5hh.

sought declaratory and injunctive relief assuring that religious speech and practices engaged in by plaintiffs would not be subject to punishment pursuant to the law, even if violative of the amended statute. Despite explicit exemptions in the statute for religious institutions and members of the clergy, *See, N.J.S.A.* 10:5-12a, as well as affidavits from the Director of the New Jersey Division on Civil Rights ("Division"), the agency designated to enforce the LAD, indicating that it had never been interpreted as applying to such entities, plaintiffs continued to pursue their challenge.

The present petition seeks review of the third and final decision in this matter from the United States Court of Appeals for the Third Circuit (Pa1-Pa13).[2] Over the course of this arduous litigation, the parties and the issues raised have been significantly refined so that this most recent decision concerns only Reverend Cummings's claims – brought as an individual acting in a secular capacity – regarding only two portions of the LAD: *N.J.S.A.* 10:5-12e (prohibiting any person from aiding, abetting, inciting, compelling or coercing another to engage in an unlawful discriminatory act), and 12n (forbidding the aiding and abetting of a boycott designed to further unlawful discriminatory purposes).[3]

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[2] "Pa" refers to the Appendix to the Petition for a Writ of *Certiorari* filed by Reverend Cummings.

"P" refers to the Petition for Writ of *Certiorari* filed by Cummings.

[3] It was not disputed below that Petitioner had waived his challenge to any other portions of the statute except for those incorporated by reference in these sections (Pa5-Pa6, n.1). As to subsection (j), which requires all persons who activities are

Cummings's first contention, that these sections were unconstitutional on their face, was rejected on all grounds. As to whether they violated the First Amendment's free speech clause, the Third Circuit concluded that the statute had not been shown to be incapable of any constitutional application because of integral "conduct restrictions" therein (Pa7-Pa9). The Court also rejected an overbreadth argument because there had been no showing that protected activities of either Cummings or third parties not before the Court might be drawn within the ambit of the LAD (Pa9-Pa10).

The Court then considered whether to address the next part of Cummings's argument, that the challenged statutory sections were unconstitutional as applied to him. It affirmed the trial court's application of the abstention doctrine pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), agreeing that: (1) New Jersey courts had yet to interpret the questioned provisions of the LAD dispositively; (2) the statutory language was susceptible of constitutionally consistent interpretation by New Jersey courts, and (3) there was a manifest potential for disruption of important state policies by invalidating critical sections of the LAD (Pa11-Pa12). Thus, it should be left to the State courts of New Jersey to interpret the LAD, and Cummings retained the right to

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included within the scope of the LAD to post notices, in a form mandated by regulation, stating the rights of those protected by the law, Cummings's claim was dismissed as unripe because the regulation specifying the form of the poster has never been amended to include mention of sexual orientation; therefore, his argument was simply theoretical (Pa6; Pa33-Pa35).

initiate an action regarding his "as applied" arguments there.

Accordingly, the trial court's decisions that Petitioner had not presented a valid facial challenge to the LAD, and to abstain from reaching his "as applied" attacks, were affirmed (Pa13).

## SUMMARY OF ARGUMENT

The writ should be denied because Petitioner has failed to establish that any portion of the New Jersey Law Against Discrimination is unconstitutional on its face or that *Pullman* abstention was inappropriately utilized. The statute is neither facially overbroad nor intrusive as to free speech rights guaranteed by the First Amendment. To the extent that any part of the statute affects speech at all, this is only incidental to its permissible regulation of discriminatory conduct. There has also been no showing that the Third Circuit Court of Appeals erred in abstaining from considering Petitioner's arguments regarding the constitutionality of this statute as applied to him. The Court correctly concluded that no portion of the language of the law had been shown to preclude a reasonable interpretation that would be constitutionally permissible. Given that the New Jersey State courts have not had occasion to construe the particular provisions at issue, the Third Circuit appropriately abstained in accordance with *Pullman*.

## ARGUMENT

**THE WRIT SHOULD BE DENIED BECAUSE THE THIRD CIRCUIT'S DECISION AS TO THE FACIAL CONSTITUTIONALITY OF THE NEW JERSEY LAW AGAINST DISCRIMINATION AND THE ISSUE OF *PULLMAN* ABSTENTION WAS ENTIRELY CONSISTENT WITH ESTABLISHED DECISIONAL LAW, AND PETITIONER HAS FAILED TO PUT FORTH A COMPELLING REASON FOR THIS COURT TO REVIEW IT.**

In urging this Court to grant the writ of *certiorari*, petitioner iterates arguments repeatedly rejected by the District Court and Third Circuit Court of Appeals that the contested sections of the LAD proscribe the communication of ideas, including ideas based in religious belief, in violation of the First Amendment. However, as the State of New Jersey has consistently maintained, and the courts have agreed, the statute avoids infringing on constitutionally protected speech because it prohibits not the expression of beliefs but discriminatory conduct which consists of more than mere communication.

Petitioner argues first that the challenged parts of the statute are unconstitutionally overbroad on their face. When addressing such a challenge, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (footnote omitted); *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). "Only a statute that is substantially over broad may be invalidated on its face." *Ibid.*; *New York v. Ferber*, 458 U.S. 747, 769 (1982). The overbreadth doctrine has been referred to as "strong medicine" that is

used "sparingly and only as a last resort." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Under the circumstances of this case, it must be concluded that the law does not on its face intrude in any way upon constitutionally protected speech.

Petitioner continually misconstrues various provisions of the LAD and ignores the interpretations of the statute historically afforded by the State as well as the numerous court rulings already rendered in this case. Both the District Court Judge and the Third Circuit rejected the argument repeated again here that the LAD "proscribes communicating ideas that are adverse to certain 'sexual orientations' " (P8). On the contrary, subsections 12e and 12n both prohibit all persons from the aiding and abetting of discriminatory acts, not merely the expression of ideas. Section 12e makes it unlawful to "aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." Section 12n contains similar language, making it illegal to "aid, abet, incite, compel, coerce, or induce" the refusal to engage in business transactions with someone based on that person's protected status. Not only is such accomplice liability a valid and essential part of the legislative goal of eradicating discrimination, but these terms, all of which have precise meaning, take the forbidden acts beyond mere speech by requiring accompanying affirmative conduct. "If discriminatory conduct engaged in by 'primary' actors using words can be constitutionally outlawed, . . . so too can discrimination engaged in by third parties who use speech or other expressive conduct to coerce a 'primary' actor to violate an anti-discrimination

statute." *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286, 296 (2d Cir. 1992). Thus, on this issue both courts below agreed that on their face these provisions regulate conduct which the State may legitimately prohibit (Pa9; Pa55).

Aiding and abetting, for example, involves more than just speech, it requires action which assists, supports and supplements the efforts of another in conduct which violates the LAD (Pa59). *See, Baliko v. Stecker*, 275 *N.J.Super.* 182, 191, 645 A.2d 1218 (App. Div. 1994) (aiding and abetting are synonymous with assisting, supporting, etc.).[4] Similarly, the term "incite" is construed consistently with current law to exclude mere expressions of opinion or opposition to the law; again, it requires conduct to be actionable (Pa59).

The type of conduct proscribed by the other terms set forth in *N.J.S.A.* 10:5-12e and 12n is characterized by excessive, threatening force, resulting in the overcoming of another's will. For example, the term "compel" requires not merely advocacy but forceful urging under

---

[4] Petitioner challenges the Third Circuit's reference to the *Baliko* decision, saying that the court made an "egregious misstatement" as to the holding in that case. Discussing the uncertainty of New Jersey law on the "aiding and abetting" provisions, the Third Circuit cited *Baliko* for the proposition that courts seem inclined to interpret these terms as they have done in the criminal law context (Pa11). Petitioner faults this reasoning on the ground that *Baliko* was not a criminal case (P16). However, he misconstrues the Third Circuit's point which was that in the civil case before it, the *Baliko* court looked to criminal law – from whence these terms of accomplice liability derive – for guidance on the appropriate way to interpret them.

extreme pressure. The hallmark is the presence of some operative force producing an involuntary response. *U.S. v. Escandar*, 465 F.2d 438, 442 (5th Cir. 1972). "Coercion" involves compelling submission in a vigorous or forcible manner. *Garrity v. State of New Jersey*, 385 U.S. 493, 565 (1967). Finally, *Black's Law Dictionary*, 697 (5 ed. 1979), defines "induce" as causing an act by prevailing upon another. These terms simply cannot be confused with expression of opinion or other non-forcible advocacy.

Nor is there merit to Petitioner's second argument that the statutory sections also impermissibly punish advocacy and prohibit speech on the basis of its content and viewpoint. It should first be noted that the 1992 amendments did not alter the basic provisions of the LAD except to add sexual and affectional orientation as a protected class. While Petitioner implies that these amendments materially changed the statute, the truth is that the provisions now under attack have been in effect for many years, and Petitioner can point to no case whatever, either initiated by the Attorney General or by private parties, in which the LAD has been found to have a chilling effect on constitutionally protected speech.[5] This supports the State's argument that not only is the statute susceptible of a constitutionally permissible interpretation, but it has consistently been so interpreted over the years.

Equally baseless is Petitioner's argument that the law now protects any person wishing to speak out in favor of

---

[5] In fact, he provides virtually no evidence that *anyone* has been prosecuted under the challenged sections of the LAD at all.

minority orientation but prohibits those who hold opposite views from expressing themselves (P13). Petitioner can obviously point to no provision in the law which does this because no such distinctions are in fact made. His assertion that the amendments at issue burden his ability to speak against certain sexual orientations fails for two reasons. First, it assumes that only the sexual orientations he opposes, homosexuality and bisexuality, are protected. An examination of the definitional sections of the LAD make clear that *all* sexual orientations are protected, be they heterosexual, bisexual or homosexual. *N.J.S.A.* 10:5-5hh to kk. Hence, the statute makes no distinctions among types of sexual orientation; it prohibits discriminatory conduct aimed at *anyone's* sexual orientation, both majority and minority.[6]

Second, since expression of a "viewpoint," religious or otherwise, is nowhere prohibited, controlled or regulated, Cummings remains free to maintain whatever religious viewpoint he chooses, even if discriminatory. However lively, simple debate does not implicate the LAD. It is only when one discriminates on the basis of a protected status (or aids and abets such discrimination) that the LAD comes into play.

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[6] Contrary to Petitioner's suggestion, "unrepentant homosexual conduct" and "heterosexual sex outside marriage" are not "favored categories under the LAD" (P11). Firstly, nowhere is "adultery" included as a protected category as Petitioner suggests. Secondly, the LAD does not permit, prefer or even address any type of sexual behavior at all. It is concerned only with the orientation or inclination of the protected individual. *See, N.J.S.A.* 10:5-5hh.

Even assuming that the LAD does tangentially infringe on some speech, the interest of the State here is so strong as to justify a minor intrusion into one's discriminatory speech. Neither the State's purpose nor the effect of the LAD is to impose a flat ban on the expression of ideas. What the statute does is target acts of discrimination, and whatever secondary impact this may have on certain kinds of speech is minimal and justified by this compelling state interest. The LAD reflects the Legislature's assessment that discrimination in society is an evil that must be addressed head-on. While First Amendment guarantees are basic rights of all citizens, courts have consistently recognized that these rights can be limited in certain circumstances when fundamental competing interests collide. In weighing these interests, courts are most concerned that the government not regulate the exchange of ideas, especially if the ideology being expressed is offensive to the majority. Clearly, the State's interest in prohibiting discrimination is substantial and compelling. *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 628 (1986); *Jews for Jesus, supra*, 968 F.2d at 295. The LAD succeeds in addressing that interest because it does not on its face seek to suppress expression.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), this Court held that advocacy alone is entitled to First Amendment protection and that a state may not forbid or proscribe advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This is precisely why the LAD contains words of specific meaning – such as "compel" and "incite" – which ensure that

enforcement of the law will not affect the expression of ideas alone. It is only when such words are accompanied by actions that rise to the level of incitement or are otherwise apt to cause unlawful conduct that the LAD applies. As this Court has recognized, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. St. Paul,* 505 U.S. 377, 390 (1992). Similarly, "simply because speech or other expressive conduct can in some circumstances be the vehicle for violating a statute directed at regulating conduct does not render that statute unconstitutional." *Jews for Jesus, supra,* 968 F.2d at 295.

This Court has held that if the government's interest is unrelated to the suppression of free expression, regulation of First Amendment free speech "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *U.S. v. O'Brien,* 391 U.S. 367, 377 (1968). The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, but such regulation may not burden substantially more speech than is necessary to further the government's legitimate interests. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

Petitioner refers the Court's attention to *Hurley v. Irish-American Gay,-Lesbian and Bisexual Group*, ___ U.S. ___, 132 L.Ed.2d 487 (1995) (P6; P14-P15), incorrectly citing it as stating that an anti-discrimination law which is designed to protect homosexuals cannot override the free speech guarantees of the First Amendment (P6). In *Hurley*, the issue was whether Massachusetts' public accommodations law could be used to require the sponsor of a parade to allow members of a protected class to participate over the sponsor's objection. For a violation to occur under Massachusetts law, state action must occur and is triggered when the discriminatory act happens in a place of public accommodation. The Court's holding was that because the parade *did not occur in a place of public accommodation*, the effect of employing the statute there was to declare the sponsors' speech itself to be the public accommodation. *Id.* at 503. Hence in *Hurley*, *this use of the state's power* violated the fundamental rule of protection under the First Amendment: that a speaker has the autonomy to choose the content of his own message. *Ibid.*

The present situation does not involve the same type of state action; here, the State is merely targeting acts of discrimination. Any impact on speech is not direct, but incidental to what is widely recognized as a valid exercise of the state's police power. In fact, the State maintains that *Hurley* actually supports the position that it has always asserted. As the Court held in *Hurley*, "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." 132 L.Ed.2d at 502. Moreover, the Court said that

the Massachusetts statute was constitutionally sound on its face, "ensur[ing] for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public . . . , that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference." *Id.* at 506. It was only when the law *was applied* to expressive activity that constitutional complications arose, *Id.* at 507; however, this offers no support to Petitioner in this case where the lower courts decided only his facial challenge, abstaining from deciding the "as applied" issues.

With respect to the issue of content-based distinctions within laws, in *R.A.V. v. St. Paul, supra,* this Court considered whether a municipal ordinance prohibiting bias-motivated disorderly conduct was constitutional. The majority of the Court found that the municipal ordinance was facially invalid under the First Amendment which prevents government from proscribing speech because of the disapproval of the ideas expressed. While affirming that certain categories of speech can be regulated consistently with the First Amendment, the majority held that government may not regulate those areas based on hostility, or favoritism, towards the nonproscribable message they contain.

Justice Scalia, writing for the plurality of the Court in *R.A.V.*, found the ordinance not only content-based but also viewpoint-based and under-inclusive. However, he noted three exceptions to the prohibition against content discrimination in the area of proscribable speech, including when a sub-class of proscribable speech happens to be associated with particular "secondary effects" of the

speech so that the regulation is justified without reference to the content of the speech. *R.A.V.*, 505 U.S. at 389.

As further explication of this "secondary effect" – and specifically relevant herein – Justice Scalia wrote that

> [a]nother valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech" [citations omitted]. A State could, for example, permit all obscene live performances except those involving minors. *Moreover, since words can in some circumstances violate laws not directed against speech but against conduct* (a law against treason, for example is violated by telling the enemy the nations defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [citations omitted]. Thus, for example, sexually derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination and employment practices [citations omitted]. *Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.*" (emphasis added, 505 U.S. at 389-90)

*R.A.V.*, then, does not absolutely prohibit even content-based distinctions in the regulation of speech accompanying permissibly regulated conduct, under certain circumstances. Nevertheless, contrary to Petitioner's misreading

of the LAD, it does not target the expressive content of Petitioner's conduct. Fairly read, the language of the LAD does not support the tortured construction advanced by Petitioner. Instead, the statute seeks to remove discrimination in employment, housing and access to public accommodations, which is universally accepted as a legitimate governmental goal.

The cases following *R.A.V.* made even clearer that it does not preclude regulating the type of conduct addressed by the LAD. For example, in *Wisconsin v. Mitchell*, 508 U.S. 476, 490 (1993), this Court found that a statute increasing the penalty for criminals who select victims based on race, religion, color, disability, sexual orientation or national origin does not violate First Amendment free speech rights. The distinction is that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., 'speech' or 'messages'), 505 U.S. at 392, the statute in this case is aimed at conduct unprotected by the First Amendment." 508 U.S. at 487. Similarly, the LAD punishes conduct, not expression, and thus civil prosecution under the statute does not violate the charged party's right to freedom of speech. Those subject to the LAD are permitted to communicate their ill will, hatred or biases without fearing an LAD prosecution; what the statute does do is prohibit them from acting on such sentiments in a discriminatory way. Moreover, that the LAD protects certain categories of individuals against discrimination does not render the statute content- or viewpoint-based. *See, Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 2523-24 (1994).

However, even assuming *arguendo* that the LAD is content-based, this would still not render the statute unconstitutional. If a State's regulation of speech is content-based, then a stricter balancing test is necessary to assure that the government is not suppressing ideas. To survive strict scrutiny, a regulation must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983). Elimination of discrimination is a compelling state interest. In *Board of Directors of International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), this Court held that the California Civil Rights Act requiring Rotary Clubs to admit women does not violate the First Amendment right of association. It said: "Even if the [Act] does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling State interest in eliminating discrimination against women." 481 U.S. at 548.

Once it has been determined that there is a compelling state interest, then a balancing test of weighing that interest against the First Amendment interest must take place. In both *Madsen v. Women's Health Center, supra,* and *Schenck v. Pro-Choice Network of Western New York,* ___ U.S. ___, 1997 WL 65718 (1997), the Court affirmed the constitutionality of injunctive orders establishing "buffer zones" which prohibit protesters from congregating around, and impeding access to, specified areas surrounding health clinics which provide abortion services. In doing so, it first determined that the injunctions were not a prior restraint and were content-neutral. *Madsen, supra,* 512 U.S. at 765; *Schenck, supra,* at p. 8. The next step

was to analyze whether the challenged provisions burden no more speech than necessary to serve a significant government interest. 512 U.S. at 765; *Ibid.* It was determined in both cases that the public interests involved (ensuring public safety and order, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services) were valid and justified appropriately tailored injunctions to secure them. *Id.* at 768; *Id.* at 10.

In the present case it must be concluded that Petitioner has seriously misconstrued the intent and effect of the LAD. It does not impinge on speech alone, and it makes no distinctions based on the preference of any sexual orientation over another. Moreover, the government's interest in eliminating discrimination against those who have been found by the New Jersey Legislature to be in need of protection is compelling. Even when balanced against the possibility that some prohibited conduct may also include speech, it is inescapable that the LAD is a reasonable statute intended to further compelling and legitimate state interests.

Petitioner also argues that *N.J.S.A.* 10:5-12, subsections (l), (m) and (n) operate as content-based discrimination toward certain boycotts. These sections of the LAD involve refusing, or inducing others to refuse, to do business with a person on the basis of his or her protected status, including sexual orientation. A fair reading of the pertinent statutory provisions, especially in conjunction with judicial decisions and the agency's history of enforcement, makes clear that the boycott sections are

appropriately drafted to further a compelling state interest and do not infringe on any constitutional right on the basis of content.

Petitioner relies on *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), which involved a boycott organized by African-American community leaders targeting white merchants who had not complied with a list of demands for "equality and racial justice." The Supreme Court viewed the boycott as comprised of a variety of activities, including gathering for meetings, speech-making, nonviolent picketing, marching, pamphleteering and encouraging others to join. These, the Court said, are all forms of speech or conduct ordinarily entitled to First and Fourteenth Amendment protection. *Id.* at 907.

Such constitutional protection, however, is not without exceptions and limitations. Because boycotting is comprised of not only speech but conduct as well, the government has a right to regulate it for compelling or substantial purposes, even if such regulation entails an incidental limitation on speech. *United States v. O'Brien*, *supra*, 391 U.S. at 376-77. As discussed above, a state law aimed at conduct which places an incidental burden on speech will be upheld if it is within the state's constitutional power and it furthers an important governmental interest unrelated to the suppression of free expression. *Ibid.*

The *Claiborne* case is distinguishable because the governmental interest being advanced there was *economic* regulation. The *Claiborne* Court held that the government's interest in regulating the economic effects of a boycott did not outweigh the boycotters' right to express

their messages. *Id.* at 913-914. Here, however, the governmental interest is not economic regulation but protection against discrimination. Content-neutral regulation of discriminatory conduct has been recognized to be a valid and compelling governmental function. *See, Wisconsin v. Mitchell, supra,* 124 L.Ed.2d at 446; *R.A.V. v. St. Paul, supra,* 505 U.S. at 389-90; *Ohio Civil Rights Comm'n v. Dayton Schools, supra,* 477 U.S. at 628.

Thus, in *Jews for Jesus, supra,* the Second Circuit held that anti-discrimination statutes could constitutionally be applied to the defendant, a coalition of religious groups, when it threatened to boycott a resort hotel because it had contracted to provide its facilities to plaintiff, a non-profit religious corporation which the defendant organization opposed. The court said that if the boycott was designed to further an unlawful discriminatory objective it would not be protected by the First Amendment. 968 F.2d at 296.

Moreover, Petitioner Cummings would not be using the boycott to "effectuate rights guaranteed by the Constitution itself" as in *Claiborne.* In fact, Petitioner admits that the only reason for such a boycott would be to discriminate on the very *status* of the targeted businessperson that entitles him or her to protection under the LAD in the first place (P14). Importantly, the *Claiborne* Court expressly stated that it was *not* addressing a boycott "designed to secure aims that are themselves prohibited by a valid state law." *Id.* at 915, n. 49. Here, the goal of the boycott – refusing to do business with someone on the basis of his or her sexual orientation – would be prohibited by State law, namely section 12l. It is therefore a vastly different situation than the one before the

*Claiborne* Court. It must be concluded, then, that the boycott provisions are clearly not violative of the First Amendment on their face.

With respect to another part of the LAD, Petitioner challenges *N.J.S.A.* 10:5-12j, which authorizes the Division to design posters, signs or other notices describing the rights of those protected by the LAD and prohibits those who are subject to the LAD from refusing to display them. Although Petitioner offers no examples of any past enforcement of this statute, he alleges that the law forces some individuals to express ideas with which they disagree by requiring the posting of signs which declare the rights of those protected under the LAD (P14-P15). This part of the complaint was dismissed below for lack of adversity of interests due to the absence of any current statutory or regulatory provision requiring that Petitioner or anyone else post a notice indicating that discrimination on the basis of sexual orientation is prohibited by law (Pa6; Pa33-35); nevertheless, the argument is clearly without merit.

It is true that the Director does, within the scope of his authority, require that certain posters or signs declaring the rights and responsibilities of those who are affected by the LAD be displayed by those who are subject to the law. Such signs are described and mandated by regulation in *N.J.A.C.* 13:8-1.1 *et seq.* In fact, under *N.J.S.A.* 10:5-12j one who fails to display such sign as required is subject to prosecution under the LAD. However, the Division has repeatedly emphasized throughout this litigation that the Director will not authorize the amendment of the relevant posters to include sexual orientation until the questions raised in this action have

been resolved. Therefore, the posters currently in circulation do not mention sexual orientation as a category of protection.[7] Moreover, should the regulations ultimately be amended, they will do no more than require those who are subject to this provision of the LAD to display notices which accurately state the current status of the protections to which all are entitled under the law.

Having concluded that the Petitioner had not demonstrated facial unconstitutionality, the lower courts both agreed to abstain from reaching the merits of his arguments regarding the statute "as applied" to him. In his challenge to this decision, he continues to maintain that the statute is facially invalid and not amenable to any state court interpretation that could rescue it. Rejecting Petitioner's argument, both courts carefully considered the fact that these provisions are largely untested by New Jersey courts, which, they reasoned, must be given the opportunity to consider whether they are susceptible of a constitutional interpretation.

It is well settled that federal courts are duty-bound to avoid reaching constitutional issues if there are other grounds that can resolve the matter. *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). It is further

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[7] Petitioner has made much of the fact that a small number of signs which included sexual orientation were inadvertently distributed by the Division's staff to persons who requested them (Pa161). The agency has repeatedly made clear, however, that this was an unauthorized action and that steps have been taken to ensure that no additional such posters were distributed until properly authorized. Thus, currently no person can be compelled to post any sign which describes sexual or affectional orientation as a category of protection.

settled that where the issues raised involve state law, "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy." *Railroad Commission of Texas v. Pullman Co.*, 312 U.S., *supra*, at 498.

When the issues revolve around the appropriate construction of a state law, deference is given to the state courts. "Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts." *Albertson v. Millard*, 345 U.S. 242, 244-45 (1953). Thus, this Court has come to recognize "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the independence of the state governments' and for the smooth working of the federal judiciary." *Pullman, supra*, 312 U.S. at 501 (citations omitted). "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system." *Harrison v. National Association for the Advancement of Colored People*, 360 U.S. 167, 176 (1959). "In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Ibid.*

Generally, *Pullman* abstention is appropriate whenever "there is an unsettled question of state law, the resolution of which would affect the decision of a federal constitutional issue, either by obviating the need to decide it or by changing the light in which it must be viewed." *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 746 (3d Cir. 1982), *cert. den.* 456 U.S. 990 (1982). Following the generally recognized prerequisites for *Pullman* abstention, the lower courts considered: that New Jersey law is uncertain as to the challenged aiding and abetting provisions as applied to religiously or politically motivated speech; that a state court decision could narrow, or obviate, the federal constitutional issues presented, and that there are important state interests at stake (Pa11-Pa13; Pa43). *See, Hughes v. Lipscher*, 906 F.2d 961, 964 (3d Cir. 1990).

A similar situation to this one was presented in *Albertson v. Millard, supra*, in which a Michigan statute requiring official registration of Communist organizations and their members was challenged as being unconstitutionally void for vagueness. This Court, noting the importance of state judicial interpretation of state laws, said that there had been no opportunity for such construction because the federal action had been commenced only five days after the statute became law. The Court said: "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action." 345 U.S. at 244-45.

Thus, the State of New Jersey, through its administrative agency and the State judiciary, must first have the opportunity to examine these provisions because of the

likelihood that they will be construed in a manner consistent with all appropriate constitutional mandates. This Court has repeatedly held that "abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' (citations omitted)." *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976). Moreover, abstention is not rendered inappropriate simply because First Amendment issues are raised. Especially when an important state interest – such as the elimination of discrimination – is presented, and the state forum offers an adequate opportunity to adjudicate constitutional questions, abstention will not be avoided by the assertion of First Amendment rights. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra*, 477 U.S. at 628.

It must also be emphasized that the LAD has consistently been construed to avoid even the possibility of an unconstitutional application, particularly respecting legitimate belief and free exercise protected by the First Amendment. In fact, in the affidavits submitted early in this litigation by the Division's Director, the agency clearly expressed its intention not to apply the LAD in any manner which, liberally construed, would even tend or threaten to violate the sincere tenets of any religion. The Division will also not engage in any determination of what constitutes a tenet of religious faith.

Thus, the Division's past practices and expressly stated intentions make clear that all First Amendment limitations on the application of the LAD have been, and

will be, respected and that no facial constitutional infirmity has been shown. It must therefore be considered likely that a similar construction will be afforded to the amended statute by New Jersey courts.

Accordingly, the lower courts were well within the scope of their discretion in concluding that the correct course of action is to abstain from deciding the constitutional questions raised by Petitioner because state judicial interpretation of the statutory provisions being challenged is likely to obviate the need for further action by our federal courts.

## CONCLUSION

For the foregoing reasons, the State of New Jersey Respondents respectfully request that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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DATED: February 26, 1997